



The WTO Agreement on Fisheries Subsidies

A Reader's Guide



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The WTO Agreement on Fisheries Subsidies: A Reader's Guide

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This reader's guide provides an overview of the Agreement on Fisheries Subsidies concluded by Members of the World Trade Organization (WTO) at their Twelfth Ministerial Conference, on June 17, 2022. It describes the rules and legal provisions that have been agreed and explains succinctly what the disciplines require. The guide also describes the key provisions on which agreement was not reached and which are the subject of further negotiations, currently ongoing. This guide is based on previous updates and analysis produced by IISD.¹

1.0 Background

Overfishing is a pressing global challenge. According to the Food and Agriculture Organization of the United Nations (FAO), 35% of assessed marine fish stocks are exploited beyond sustainable levels, a share that has been steadily increasing since the 1970s (FAO, 2022). The significant overcapitalization of the global fishing fleet has resulted in continuous declines in the sector's productivity, threatening the sustainability of marine resources but also employment opportunities, livelihoods, and food security (Rousseau et al., 2019; World Bank, 2017; World Bank & FAO, 2009). It is widely recognized that certain types of subsidies can lead to the buildup of excessive fishing capacity, incentivize unsustainable levels of fishing, and contribute to the depletion of fish stocks by reducing the cost of fishing operations or enhancing revenues (Martini & Innes, 2018). According to recent global estimates, subsidies to the fisheries sector came to around USD 35.4 billion in 2018, of which around USD 22.2 billion was provided in a form that enhances fishing capacity (Sumaila et al., 2019).

WTO members decided to put the issue of fisheries subsidies on the organization's agenda at the 2001 Doha Ministerial Conference. This original mandate was then supplemented by a more detailed one agreed upon at the 2005 Hong Kong Ministerial Conference. These mandates called for WTO members to "strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing" (WTO, 2005, p. D-2). Members also agreed that "appropriate and effective special and differential treatment (SDT) for developing and least-developed members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns" (WTO, 2005, p. D-2).

The conclusion of new multilateral rules on fisheries subsidies, however, long proved elusive. After numerous years of on-and-off talks, the WTO process was given new impetus by the adoption of the United Nations (UN) Sustainable Development Goals in 2015. SDG Target 14.6 specifically called for the prohibition by 2020 of certain forms of fisheries subsidies that contribute to overcapacity and overfishing and the elimination of subsidies that contribute to illegal, unreported, and unregulated (IUU) fishing, recognizing that

¹ See Tipping & Irschlinger, 2020, 2021; Irschlinger & Tipping, 2022; and IISD, 2022.



appropriate and effective SDT for developing and least-developed countries should be an integral part of the WTO fisheries subsidies negotiations (UN General Assembly, 2015).

Following a failed attempt to conclude an agreement at the WTO's 11th Ministerial Conference in 2017, and a postponement of the 12th Ministerial Conference due to the Covid-19 pandemic, the chair of the negotiations released a complete draft text for the agreement in May 2021 (WTO, 2021b), building on members' proposals and discussion. Updated draft texts (WTO, 2021c, 2021d) were then released in the lead-up to the 12th Ministerial Conference scheduled for November 2021. A draft agreement was tabled on November 24, 2021 (WTO, 2021a), the week before ministers were due to land in Geneva, including only very few brackets around unresolved issues to be decided by ministers. However, 4 days before MC12 was scheduled to take place, travel restrictions linked to the outbreak of the Omicron variant of COVID-19 forced the further postponement of MC12 until June 2022.

Work at the WTO was then disrupted as a result of Russia's invasion of Ukraine in February 2022, and talks on fisheries subsidies only really picked up in May 2022, a month and a half before MC12. In the lead-up to the conference, discussions intensified, as negotiators attempted to resolve some of the remaining sticking points in the draft agreement circulated in November 2021. This process led to progress on several issues and a new version of the draft agreement was released on June 6, 2022 (WTO, 2022b), reflecting both a narrowing of gaps and persisting divergences in some of the key provisions. While not all of these issues could be resolved at MC12, members succeeded in concluding an agreement containing several key disciplines. After more than two decades of negotiations, the deal establishes a set of binding prohibitions and rules on fisheries subsidies, with members also committing to continue talks to conclude a more comprehensive agreement in the future (WTO, 2022a).

Following the structure of the WTO Agreement on Fisheries Subsidies (the Agreement), this reader's guide starts by looking at the scope of the disciplines (briefly touching upon definitions) before addressing the three main substantive areas in which new rules and prohibitions have been agreed: (1) subsidies that contribute to IUU fishing; (2) subsidies for fishing and fishing-related activities regarding overfished stocks; and (3) other subsidies, including those provided to fishing on the unregulated high seas, to re-flagged vessels, and to fishing on unassessed stocks. A number of crosscutting issues are then addressed, including horizontal SDT provisions, transparency and notification, institutional issues, and dispute settlement. In each section, a summary box is provided to outline the key elements of the Agreement. The key legal provisions from the treaty are also reproduced in their corresponding sections. The briefing paper concludes by quickly describing and explaining the provisions on which members were not able to agree at MC12, in particular on subsidies that contribute to overcapacity and overfishing, which will be the subject of further negotiations at the WTO.



2.0 Scope

Relevant provisions

ARTICLE 1: SCOPE

This Agreement applies to subsidies, within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that are specific within the meaning of Article 2 of that Agreement, to marine wild capture fishing and fishing related activities at sea.^{1, 2, 3}

ARTICLE 2: DEFINITIONS

This Agreement applies to subsidies, within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that are specific within the meaning of Article 2 of that Agreement, to marine wild capture fishing and fishing related activities at sea.^{1, 2, 3}

For the purpose of this Agreement:

- (a) "fish" means all species of living marine resources, whether processed or not;
- (b) "fishing" means searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish;
- (c) "fishing related activities" means any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea;
- (d) "vessel" means any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities;
- (e) "operator" means the owner of a vessel, or any person, who is in charge of or directs or controls the vessel.

¹ For greater certainty, aquaculture and inland fisheries are excluded from the scope of this Agreement.

² For greater certainty, government-to-government payments under fisheries access agreements shall not be deemed to be subsidies within the meaning of this Agreement.

³ For greater certainty, for the purposes of this Agreement, a subsidy shall be attributable to the Member conferring it, regardless of the flag or registry of any vessel involved or the nationality of the recipient.

Article 1 of the Agreement sets out the type of subsidies covered by the disciplines and the overall scope of the rules. According to this article, the Agreement applies to subsidies as defined in Article 1 of the WTO Agreement on Subsidies and Countervailing Measures (ASCM) that are specific within the meaning of Article 2 of the same agreement. Article 1 also specifies that disciplines should apply only to marine wild capture fishing and fishing-related activities at sea. This means the rules would apply to subsidies to activities like onboard processing and transshipping of catch but would exclude, for example, subsidies to pre- and



post-harvest activities such as packaging or processing if they happen onshore. Footnotes also explicitly clarify that subsidies to aquaculture and inland fisheries are excluded from the scope of the Agreement, that payments made by governments to other governments under fisheries access agreements should not be considered to be subsidies, and that subsidies must be attributed to the member providing them, regardless of the flag or registry of vessels or the nationality of recipients.

In Article 2, the Agreement defines a number of key terms. It includes definitions of fish, fishing, fishing-related activities, vessel, and operator, most of which are taken from the FAO's Port State Measure Agreement. Importantly, the definition of fish used in the Agreement is broad, including "all species of living marine resources." As such, the new rules will apply to all living marine organisms, including invertebrates, mammals, plants, and reptiles.

Summary box: Scope

The Agreement applies to "subsidies," as defined in ASCM Article 1, that are specific under ASCM Article 2, provided to marine wild capture fishing and fishing-related activities at sea.

The Agreement does not cover subsidies to aquaculture or land-based activities, but it does cover subsidies to activities such as processing if they occur at sea.



3.0 IUU Fishing

Relevant provisions

ARTICLE 3: SUBSIDIES CONTRIBUTING TO ILLEGAL, UNREPORTED AND UNREGULATED FISHING⁴

- 3.1 No Member shall grant or maintain any subsidy to a vessel or operator⁵ engaged in illegal, unreported and unregulated (IUU) fishing or fishing related activities in support of IUU fishing.
- 3.2 For purposes of Article 3.1, a vessel or operator shall be considered to be engaged in IUU fishing if an affirmative determination thereof is made by any of the following^{6,7}:
- (a) a coastal Member, for activities in areas under its jurisdiction; or
 - (b) a flag State Member, for activities by vessels flying its flag; or
 - (c) a relevant Regional Fisheries Management Organization or Arrangement (RFMO/A), in accordance with the rules and procedures of the RFMO/A and relevant international law, including through the provision of timely notification and relevant information, in areas and for species under its competence.
- 3.3
- (a) An affirmative determination⁸ under Article 3.2 refers to the final finding by a Member and/or the final listing by an RFMO/A that a vessel or operator has engaged in IUU fishing.
 - (b) For purposes of Article 3.2(a), the prohibition under Article 3.1 shall apply where the determination by the coastal Member is based on relevant factual information and the coastal Member has provided to the flag State Member and, if known, the subsidizing Member, the following:
 - (i) timely notification, through appropriate channels, that a vessel or operator has been temporarily detained pending further investigation for engagement in, or that the coastal Member has initiated an investigation for, IUU fishing including reference to any relevant factual

⁴ "Illegal, unreported and unregulated (IUU) fishing" refers to activities set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing adopted by the UN Food and Agriculture Organization (FAO) in 2001.

⁵ For the purpose of Article 3, the term "operator" means the operator within the meaning of Article 2(e) at the time of the IUU fishing infraction. For greater certainty, the prohibition on granting or maintaining subsidies to operators engaged in IUU fishing applies to subsidies provided to fishing and fishing related activities at sea.

⁶ Nothing in this Article shall be interpreted to obligate Members to initiate IUU fishing investigations or make IUU fishing determinations.

⁷ Nothing in this Article shall be interpreted as affecting the competence of the listed entities under relevant international instruments or granting new rights to the listed entities in making IUU fishing determinations.

⁸ Nothing in this Article shall be interpreted to delay, or affect the validity or enforceability of, an IUU fishing determination.



information, applicable laws, regulations, administrative procedures, or other relevant measures;

- (ii) an opportunity to exchange relevant information⁹ prior to a determination, so as to allow such information to be considered in the final determination. The coastal Member may specify the manner and time period in which such information exchange should be carried out; and
- (iii) notification of the final determination, and of any sanctions applied, including, if applicable, their duration.

The coastal Member shall notify an affirmative determination to the Committee provided for in Article 9.1 (referred to in this Agreement as "the Committee").

- 3.4 The subsidizing Member shall take into account the nature, gravity, and repetition of IUU fishing committed by a vessel or operator when setting the duration of application of the prohibition in Article 3.1. The prohibition in Article 3.1 shall apply at least as long as the sanction¹⁰ resulting from the determination triggering the prohibition remains in force, or at least as long as the vessel or operator is listed by an RFMO/A, whichever is the longer.
- 3.5 The subsidizing Member shall notify the measures taken pursuant to Article 3.1 to the Committee in accordance with Article 8.3.
- 3.6 Where a port State Member notifies a subsidizing Member that it has clear grounds to believe that a vessel in one of its ports has engaged in IUU fishing, the subsidizing Member shall give due regard to the information received and take such actions in respect of its subsidies as it deems appropriate.
- 3.7 Each Member shall have laws, regulations and/or administrative procedures in place to ensure that subsidies referred to in Article 3.1, including such subsidies existing at the entry into force of this Agreement, are not granted or maintained.
- 3.8 For a period of 2 years from the date of entry into force of this Agreement, subsidies granted or maintained by developing country Members, including least-developed country (LDC) Members, up to and within the exclusive economic zone (EEZ) shall be exempt from actions based on Articles 3.1 and 10 of this Agreement.

⁹ For example, this may include an opportunity to dialogue or for written exchange of information if requested by the flag State or subsidizing Member.

¹⁰ Termination of sanctions is as provided for under the laws or procedures of the authority having made the determination referred to in Article 3.2.

Article 3 of the Agreement establishes subsidy rules that relate to IUU fishing. IUU fishing remains a pervasive problem in global fisheries. It undermines fisheries management regimes and affects fisheries' ability to deliver key socio-economic benefits sustainably. Estimates suggest that the economic losses associated with IUU fishing could be as high as USD 50 billion each year (Sumaila et al., 2020). In Article 3, WTO members agreed that a vessel or operator that has been found to engage in IUU fishing activities, or any vessel that provides at-sea support to an IUU vessel (such as bunkering, replenishment, or other



support activities), should not benefit from any form of subsidies (Article 3.1).² This rather strict prohibition is balanced by specific provisions that set out the requirements that an IUU determination must fulfill in order to trigger the prohibition (Articles 3.2 and 3.3) and that provide the subsidizing member with some level of control over how the prohibition is applied, in particular in determining the duration for which the prohibition applies (Article 3.4). In recognition of developing countries' need for some time to implement the rule, their subsidies to vessels or operators fishing in their own domestic waters are shielded from legal challenges under the IUU subsidy prohibition for 2 years (Article 3.8). The prohibition is also accompanied by softer, complementary rules, including one that allows port states to bring evidence of possible IUU fishing to the attention of the member subsidizing the vessel involved (Articles 3.6 and 3.7).

3.1 How the Prohibition Is Triggered

Article 3.2 of the Agreement addresses the question of who can trigger this subsidy prohibition. It provides that the prohibition can be triggered by an affirmative determination of IUU fishing made by a WTO member acting either in its capacity as a coastal state, for activities occurring in the waters under its jurisdiction (i.e., in its exclusive economic zone [EEZ], an area of sea out to 200 nautical miles from the baseline), or as a flag state, for the activities of vessels flying its flag, which can occur on the high seas or in another member's EEZ. In both cases, the IUU determination can target either a domestic vessel or a vessel owned, operated, and/or subsidized by another member. According to Article 3.2, the subsidy prohibition can also be triggered by a determination made by a regional fisheries management organization or arrangement (RFMO/A) if the IUU fishing activity took place in the waters, and for the species, under its competence.³

Importantly, the Agreement explicitly records in a footnote that there is no obligation for members to make IUU determinations. Rather, if and when an affirmative IUU determination is made by one of the competent authorities, members would have an obligation not to subsidize the vessel or operator that is the subject of the determination or any support vessel. The Agreement also includes an explicit obligation for members to have laws, regulations, and/or administrative procedures that ensure that no such prohibited subsidies are provided (Article 3.7).

3.2 Requirements for Determinations to Trigger the Prohibition

A key question throughout the negotiation of this rule was how much deference should be accorded to an IUU determination made by another WTO member or RFMO/A, and more specifically what due process or other requirements, if any, would need to be fulfilled

² The Agreement uses the description of IUU fishing found in the 2001 FAO *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing* to define IUU fishing.

³ Public information about vessels that are the subject of IUU determinations by coastal or flag states is patchy, but a consolidation of all RFMO lists of IUU vessels included only around 335 vessels as of February 14, 2023 (see the Tryg Mat Tracking IUU Vessel List at www.tm-tracking.org).



for a determination to trigger the subsidizing member's obligation not to provide subsidies. The key consideration here was to ensure that the determinations that activate the subsidy prohibition are fair, but without sacrificing the effectiveness of the rule. On this question, members have progressively converged on the approach that is included in Articles 3.2 and 3.3 of the Agreement. The objective of these provisions is to ensure that minimum evidence-based and procedural requirements are met in order for an IUU determination to trigger a subsidy prohibition under this agreement.

Article 3.3(b) establishes that in order to trigger the prohibition, determinations made by coastal state members must rely on relevant factual information and follow a number of key procedural steps.⁴ The flag state member and, if known, the subsidizing member must be (1) notified at the beginning of the determination process; (2) provided with an opportunity to provide information to be taken into account in the determination process; and (3) notified of the final determination and any sanction applied. More generally, the coastal state also has an obligation to notify the committee administering the agreement—and thus all other WTO members—of any affirmative determination of IUU fishing that it has made. Article 3.2(c) specifies that determinations of IUU fishing made by RFMO/As should be made following the RFMO/As' own rules and procedures, in accordance with relevant international law, and must also include the provision of timely notification and relevant information, presumably to the flag state of the vessel involved, if they are to trigger the subsidy prohibition.

Importantly, the Agreement clarifies in a footnote that nothing in the new rules affects the validity and enforceability of IUU determinations themselves or delays such determinations. The intention here is to ensure that even if an IUU determination is found not to have met the procedural requirements required for it to trigger the subsidy prohibition under the treaty, the determination and its consequences under national law are not affected. The language used (see Article 3.1(b)(ii)) also suggests that, while flag states must be provided with the opportunity to provide information for an IUU determination to trigger the subsidy prohibition, this does not mean that the coastal state must wait indefinitely for the information and thus delay the overall determination procedure. Another footnote also specifies that the new rules should neither affect in any way the competence of coastal members, flag state members, and RFMO/As under other international instruments nor give them new rights to make IUU determinations. This savings provision was included to ensure that the treaty did not inadvertently alter the powers delegated to different entities under international maritime law.

⁴ The Agreement does not include any particular requirement for IUU determinations made by flag state members to trigger the subsidy prohibition. As a result, in cases where the coastal member making an IUU determination is also the relevant flag state, such determination do not have to meet any particular requirement to trigger the subsidy prohibition.



3.3 Flexibility for the Subsidizing Member in Applying the Prohibition

Another key element of Article 3, which also forms an integral part of the balance struck by members, relates to the level of control the subsidizing member has over the application of the subsidy prohibition once a determination is made. According to paragraph 3.4 of the Agreement, it is up to the member subsidizing a vessel or operator to decide how long this vessel or operator will be prevented from receiving subsidies for, taking into account “the nature, gravity, and repetition of IUU fishing committed.” The relatively automatic triggering of the prohibition is thus further balanced by giving the subsidizing member some control over the impact of the prohibition on its vessels or operators. However, the subsidizing member’s discretion is not absolute. To limit such discretion, the Agreement also includes a form of safeguard that requires that the prohibition of subsidies must be applied for at least as long as the original sanction on the IUU vessel or operator remains in force, or as long as the vessel or operator is listed as engaged in IUU fishing, whichever is the longer.

3.4 SDT

Generally speaking, developing country members’ demands for SDT with regard to the subsidy rules on IUU fishing have remained relatively limited throughout the negotiation process. This reflects a broad recognition among members that IUU fishing is a particularly serious issue and that broad exemptions from these rules would not be justified. But in recognition of the fact that developing countries might require some time to implement the new obligation, Article 3.8 provides for a 2-year grace period from WTO dispute settlement (also called “peace clause”) for breaches of the IUU subsidy prohibition when subsidies are provided by developing country members to activities that occur in their domestic EEZ. In other words, while the prohibition would still apply to all fleets from the entry into force of the Agreement, WTO members would not be able to enforce this rule through dispute settlement for subsidies by developing countries for fishing within their EEZ during that period of time.

3.5 Due Regard and Appropriate Action Obligation With Regards to Port State Notifications

On top of the subsidy prohibition and related provisions, Article 3.6 of the Agreement also introduces a separate obligation. This rule requires a subsidizing member to give due regard to information received from a port state member about a vessel’s engagement in IUU fishing and to take appropriate actions with regard to its subsidies to that vessel or to vessels that may provide at-sea support to that vessel. Unlike situations where an IUU determination is made by a coastal member, flag state member, or RFMO/A, there is no outright subsidy prohibition here. According to this rule, the subsidizing member would only need to take any action it deems appropriate. This may include the removal or non-granting of subsidies in cases where the subsidizing member concludes through its own domestic procedures that the vessel has indeed engaged in IUU fishing, but also other, less strict actions in other situations.



Summary box: IUU fishing

Main prohibition: Members agree not to provide subsidies to vessels or operators found to have engaged in IUU fishing or fishing-related activities in support of IUU fishing.

How the Prohibition Is Triggered

It is triggered when a coastal member, a flag state member, or a relevant RFMO/A makes an affirmative determination that a vessel or operator has engaged in IUU fishing activity.

Requirements for Determinations to Trigger the Prohibition

Determinations made by coastal members must be based on relevant factual information and follow a few key procedural steps, including notification of the flag state and (if known) the subsidizing member and the ability for both to provide information in the determination process.

Determinations by RFMO/As must be in accordance with the RFMO/As' procedures and relevant international law and involve the provision of timely notification and relevant information.

Flexibility for the Subsidizing Member in Applying the Prohibition

The subsidizing member sets the duration of the prohibition of subsidies, taking into account the severity of the infraction. At a minimum, the prohibition shall apply as long as the IUU sanction remains in force or the vessel or operator is listed on an IUU list, whichever is the longer.

SDT (Peace Clause)

Developing country members' subsidies for activities occurring in their domestic EEZ cannot be challenged at the WTO during the first two years after entry into force.

Note: Members have no obligation to make IUU determinations; they must only refrain from providing subsidies to IUU (or IUU-supporting) vessels or operators when a determination is made.

Legislation and measures obligation: All members must have laws, regulations, and/or administrative procedures in place to ensure that no subsidies are granted to or maintained by any vessel or operator engaged in IUU fishing.

Due regard and appropriate action obligation: A subsidizing member has an obligation to give due regard to a notification by a port state member that a vessel in one of its ports has engaged in IUU fishing and to take appropriate action with regard to its subsidies.



4.0 Overfished Stocks

Relevant provisions

ARTICLE 4: SUBSIDIES REGARDING OVERFISHED STOCKS

- 4.1 No Member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock.
- 4.2 For the purpose of this Article, a fish stock is overfished if it is recognized as overfished by the coastal Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A in areas and for species under its competence, based on best scientific evidence available to it.
- 4.3 Notwithstanding Article 4.1, a Member may grant or maintain subsidies referred to in Article 4.1 if such subsidies or other measures are implemented to rebuild the stock to a biologically sustainable level.¹¹
- 4.4 For a period of 2 years from the date of entry into force of this Agreement, subsidies granted or maintained by developing country Members, including LDC Members, up to and within the EEZ shall be exempt from actions based on Articles 4.1 and 10 of this Agreement.

¹¹ For the purpose of this paragraph, a biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using reference points such as maximum sustainable yield (MSY) or other reference points, commensurate with the data available for the fishery; or by a relevant RFMO/A in areas and for species under its competence.

Article 4 of the Agreement addresses situations in which stocks are overfished—that is, their abundance is considered too low to ensure safe reproduction⁵. According to the FAO, more than a third of assessed marine fish stocks globally are overexploited, and this proportion has been steadily increasing over the last few decades (FAO, 2022). Article 4 prohibits WTO members from providing subsidies for fishing and fishing-related activities regarding overfished stocks (Article 4.1). This relatively strict prohibition is balanced with an exemption that allows the provision of subsidies in the context of particular programs and in particular situations (Article 4.3), as well as a grace period for developing countries fishing in their national waters (Article 4.4).

4.1 How the Prohibition Is Triggered

A key point of discussion in this area was around how the rules should establish, for the purposes of the subsidy prohibition, that a stock is overfished. The approach adopted in Article 4.2 of the Agreement is that the prohibition would apply when a coastal member (for fishing occurring under its jurisdiction) or a relevant RFMO/A (for fisheries under its competence) recognizes a stock as overfished. However, deference to RFMO/A and national

⁵ FAO Term Portal, available at: <https://www.fao.org/faoterm/en/>.



decisions is not total. To limit the risk of arbitrariness, the text requires stock status decisions to be based on the “best scientific evidence available” to the member or RFMO/A, which reflects similar language in Article 61 of the United Nations Convention on the Law of the Sea. Coastal states, in particular, wanted to ensure they had some control over when the prohibition is triggered in their own EEZs. While the balance here is tilted toward deference to national and RFMO/A decisions, the text would require the entity making the stock status decisions to consider all the evidence available to it in deciding whether a stock is overfished.

4.2 Sustainability-Related Exemption for the Subsidizing Member

Another key question throughout the negotiation was whether there should be any exemption from the prohibition in situations where policy efforts are made to rebuild overfished stocks back to healthy levels. In Article 4.3, the Agreement includes a double exemption, which softens the strictness of the basic prohibition. First, subsidies that are themselves implemented to help an overfished stock to recover toward “a biologically sustainable level” are still allowed. Such subsidies may include support for the acquisition of more selective fishing gear, for example, or for improving fishers’ catch-monitoring capacities. Second, all subsidies are exempted from the prohibition in situations where fisheries management measures are implemented to rebuild stocks to a biologically sustainable level. Importantly, the Agreement does not explicitly require evidence that the subsidies or management measures are effective in rebuilding a stock for a member to be able to invoke this exemption, although this would appear to be the objective.

The concept of a biologically sustainable level, which was the subject of much debate, is explained in footnote 10. Such a level can be determined by a coastal state, using either reference points based on the widely recognized concept of maximum sustainable yield (MSY) or other reference points that are commensurate with the data available in a given fishery, or by an RFMO/A. The language in the footnote is important because while in some cases members define the notion of a biologically sustainable level based on the concept of MSY, in others, they use different criteria (see Headley, 2020). In practice, the method often depends on the data available. The footnote explicitly allows for MSY or other reference points to be used and allows the data used to establish the biologically sustainable level to be commensurate with the data available for the fishery, meaning fisheries monitoring systems of very different levels of sophistication can be used to prove the level is biologically sustainable.

4.3 SDT

Demands for SDT with regard to this prohibition have also been relatively limited, reflecting an acknowledgement by members that overfished stocks are in a particularly vulnerable situation and that wide exemptions would not be justified. Like for the IUU subsidy prohibition, the Agreement includes a 2-year grace period from WTO dispute settlement (also called “peace clause”) for developing country members regarding subsidies to fishing or fishing-related activities on overfished stocks within their domestic EEZ. That is, the



prohibition still applies to activities that meet these characteristics, but the rule cannot be enforced through dispute settlement for that period.

An important point to note here is that nothing in this rule obliges members to formally assess all of the fish stocks in their jurisdiction (although more information would clearly be useful). It is only when a member, or an RFMO, decides a stock is overfished that the prohibition is triggered.

Summary Box: Overfished stocks

Prohibition: Members agree not to provide subsidies for fishing or fishing-related activities regarding stocks that are overfished.

How the Prohibition Is Triggered

It is triggered when a stock is recognized as overfished by a coastal member or a relevant RFMO/A, based on the best scientific evidence available to the coastal member or RFMO.

Sustainability-related Exemption for the Subsidizing Member

The prohibition does not apply if the subsidies themselves, or if fisheries management measures, are implemented to rebuild the overfished stock(s) to a biologically sustainable level.

SDT (Peace Clause)

Developing countries' subsidies for fishing or fishing-related activities on overfished stocks in their domestic EEZ cannot be challenged at the WTO during the first 2 years after entry into force.

Note: Members have no obligation to assess stocks; they must only refrain from providing subsidies when stocks are recognized as overfished by a relevant coastal member or RFMO/A.



5.0 Other Subsidies

Relevant provisions

ARTICLE 5: OTHER SUBSIDIES

- 5.1 No Member shall grant or maintain subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant RFMO/A.
- 5.2 A Member shall take special care and exercise due restraint when granting subsidies to vessels not flying that Member's flag.
- 5.3 A Member shall take special care and exercise due restraint when granting subsidies to fishing or fishing related activities regarding stocks the status of which is unknown.

ARTICLE 11: FINAL PROVISIONS

- 11.1 Except as provided in Articles 3 and 4, nothing in this Agreement shall prevent a Member from granting a subsidy for disaster¹⁹ relief, provided that the subsidy is:
 - (a) limited to the relief of a particular disaster;
 - (b) limited to the affected geographic area;
 - (c) time-limited; and
 - (d) in the case of reconstruction subsidies, limited to restoring the fishery, and/or the affected fleet up to its pre-disaster level
- [...]

¹⁹ For greater certainty, this provision does not apply to economic or financial crises.

On top of subsidy prohibitions applying in specific situations (when an IUU determination is made or a fish stock is recognized as being overfished), the Agreement also includes three additional rules in Article 5 under the heading of “other subsidies.” These rules include a prohibition of subsidies to fishing and fishing-related activities occurring on the unregulated high seas (Article 5.1), as well as two softer rules requiring members to show particular caution when granting subsidies in two types of situations: (a) when subsidized vessels do not fly the subsidizing member's flag (Article 5.2), and (b) when the status of fish stocks is unknown (Article 5.3). These rules all address situations where subsidization is considered risky from a sustainability perspective, in particular because governments may have less control over the ultimate impact of subsidies on the health of fish stocks. Subsidies for disaster relief, however, are exempted from their application (Article 11.1).



5.1 Unregulated High Seas Subsidy Prohibition

The Agreement's third subsidy prohibition is included in Article 5.1. This rule prohibits members from providing any subsidy to fishing and fishing-related activities occurring on the high seas that do not fall within the competence of a relevant RFMO/A. RFMO/As' competences are generally defined through mandates that establish both the geographic area and the species for which the RFMO/A is competent. Some RFMO/As focus, for example, on particular species (e.g., tuna and tuna-like species) in a given maritime area, while others have competence for all species within a maritime area. The rule was originally drafted to refer to RFMO/A "areas." This was later changed to RFMO/A "competence," which means that subsidies are only allowed to fishing and fishing-related activities that fall within the geographic and species mandate of an RFMO/A. Subsidies to fishing and fishing-related activities outside the geographic mandate of any RFMO are therefore prohibited, as are subsidies to activities within the geographic mandate of an RFMO/A but regarding species that are not in its species mandate. The rationale of the prohibition is that on the high seas, no state can regulate fishing on its own, and fisheries management must occur through international cooperation. This means that when no cooperative fisheries management regime exists, there is no actor that has competence for managing fisheries and ensuring they are sustainably exploited. As such, this subsidy prohibition thus targets situations in which no effective management can be in place.

Unlike the subsidy prohibitions regarding IUU fishing and overfished stocks, this prohibition is not triggered by a particular decision or determination made by the institutions in charge of fisheries research, management or enforcement. Rather, it follows from the absence of a management regime for some activities occurring on the high seas. Applying it will thus require information both on the geographic area in which subsidized activities occur, as well as on whether such activities fall within the competence of a relevant RFMO/A, as defined by the mandate of such RFMO/A in terms of both geographic area and fish species.

5.2 Special Care Obligations Regarding Re-flagged Vessels and Unassessed Stocks

In addition to the subsidy prohibition regarding unregulated high sea fishing and fishing-related activities, Article 5 also includes two other, softer rules. These two disciplines require WTO members to "take special care and exercise due restraint" when they grant subsidies in two different types of situations that are considered risky.

The first of these rules is found in Article 5.2 of the Agreement and refers to situations in which the subsidizing member grants subsidies to vessels that do not fly its flag. The rules that apply to the registration of vessels can differ significantly between countries. While some countries allow only the registration of ships that have ties to the country (e.g., ownership or crewing), others allow vessels to fly their flag even if such vessels are controlled or owned by foreign companies (often called "open registries"). In some situations, subsidies may thus be provided by a member to a vessel that flies the flag of another country. When that is the case, the subsidizing member does not have any jurisdictional link or control over the vessel's activities—including in terms of compliance with fisheries regulations—if such activities



are conducted outside of the subsidizing Member's waters. Recognizing that this lack of jurisdiction or control can be risky from a sustainability perspective, members committed to showing particular caution when subsidizing vessels that do not fly their flag.

The second rule, found in Article 5.3, introduces an obligation of the same nature, but applying to situations in which the status of fish stocks is unknown. Information on the status of a stock is important for managing its exploitation in a sustainable way. When such information is lacking, it is difficult for fisheries management authorities and organizations to determine how much of that stock can be caught sustainably and implement an appropriate management plan, making it particularly risky to incentivize increased fishing effort through subsidies. Article 5.3 thus requires members to take special care and exercise due restraint when providing subsidies to activities regarding stocks for which no stock status information is available.

While these two rules are less strict than an outright subsidy prohibition, they establish an obligation for subsidizing members to be particularly cautious when granting subsidies to re-flagged vessels and activities regarding unassessed stocks. The Agreement, however, is not prescriptive in that regard and does not specify what actions would need to be taken to take "special care" and exercise "due restraint."

5.3 Exemption for Subsidies for Disaster Relief

Importantly, a provision included in Article 11.1 of the Agreement exempts subsidies for disaster relief from the rules established in Article 5. These rules include the subsidy prohibition regarding fishing and fishing-related activities occurring on the unregulated high seas, as well as the special care and due restraint obligations for subsidies to re-flagged vessels and subsidies regarding unassessed stocks. To benefit from this exemption, subsidies must meet a number of criteria set out in Article 11.1. They must be: (a) limited to the relief of a disaster; (b) limited to the affected geographic area; (c) time-limited; and (d) for reconstruction subsidies, limited to restoring the affected fishery or fleet to its pre-disaster level. Subsidies that meet these criteria are, therefore, unaffected by the rules found in Article 5. A footnote also clarifies that this exemption does not apply to economic and financial crises.

Summary Box: Other subsidies

Unregulated high seas prohibition: Members agree not to provide subsidies to fishing and fishing-related activities that occur on the high seas and do not fall within the competence of a relevant RFMO/A.

Special care obligations

Members must take special care and exercise due restraint when granting subsidies:

- to vessels that do *not* fly their flag;
- to fishing and fishing-related activities regarding unassessed stocks.

Note: There are no SDT provisions related to the obligations in Article 5.



6.0 Horizontal SDT Provisions

Relevant provisions

ARTICLE 6: SPECIFIC PROVISIONS FOR LDC MEMBERS

A Member shall exercise due restraint in raising matters involving an LDC Member and solutions explored shall take into consideration the specific situation of the LDC Member involved, if any.

ARTICLE 7: TECHNICAL ASSISTANCE AND CAPACITY BUILDING

Targeted technical assistance and capacity building assistance to developing country Members, including LDC Members, shall be provided for the purpose of implementation of the disciplines under this Agreement. In support of this assistance, a voluntary WTO funding mechanism shall be established in cooperation with relevant international organizations such as the Food and Agriculture Organization of the United Nations (FAO) and International Fund for Agricultural Development. The contributions of WTO Members to the mechanism shall be exclusively on a voluntary basis and shall not utilize regular budget resources.

Beyond the grace period for developing members under the subsidy prohibitions regarding IUU fishing and overfished stocks, the Agreement also includes some crosscutting, horizontal SDT provisions. These consist of an LDC-specific due restraint clause and provisions regarding technical assistance and capacity building (TACB). Article 6 of the Agreement introduces an obligation for members to exercise due restraint in raising matters involving LDCs under the Agreement, and explicitly requires that the specific situation of an LDC is taken into account in exploring possible solutions. Article 7 of the Agreement covers TACB. It includes an obligation to provide TACB for the implementation of the instrument⁶ and provides for the creation of a specific voluntary funding mechanism under the WTO in cooperation with the FAO and the International Fund for Agricultural Development to support the implementation of the disciplines. This funding mechanism, which became operational in late 2022, is funded by voluntary contributions from members.

Summary box: Horizontal SDT provisions

Members shall exercise “due restraint” in raising matters involving LDC members.

Technical assistance shall be provided to developing countries to implement the disciplines of the agreement, and a voluntary WTO funding mechanism shall be established for that purpose.

⁶ IISD has developed a self-assessment tool that allows members to identify the steps they need to undertake to implement the Agreement and identify their TACB needs in relation to implementation (IISD, 2022). On the topic of the role of technical assistance and capacity building in the implementation of the Agreement, also see Global Subsidies Initiative (2020).



7.0 Notification and Transparency

Relevant provisions

ARTICLE 8: NOTIFICATION AND TRANSPARENCY

- 8.1 Without prejudice to Article 25 of the SCM Agreement and in order to strengthen and enhance notifications of fisheries subsidies, and to enable more effective surveillance of the implementation of fisheries subsidies commitments, each Member shall
- (a) provide the following information as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement^{12,13}: type or kind of fishing activity for which the subsidy is provided;
 - (b) to the extent possible, provide the following information as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement^{12,13}:
 - (i) status of the fish stocks in the fishery for which the subsidy is provided (e.g. overfished, maximally sustainably fished, or underfished) and the reference points used, and whether such stocks are shared¹⁴ with any other Member or are managed by an RFMO/A;
 - (ii) conservation and management measures in place for the relevant fish stock;
 - (iii) fleet capacity in the fishery for which the subsidy is provided;
 - (iv) name and identification number of the fishing vessel or vessels benefitting from the subsidy; and
 - (v) catch data by species or group of species in the fishery for which the subsidy is provided.¹⁵
- 8.2 Each Member shall notify the Committee in writing on an annual basis of a list of vessels and operators that it has affirmatively determined as having been engaged in IUU fishing.
- 8.3 Each Member shall, within one year of the date of entry into force of this Agreement, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement, including the steps taken to implement prohibitions set out in Articles 3, 4 and 5. Each Member shall

¹² For the purpose of Article 8.1, Members shall provide this information in addition to all the information required under Article 25 of the SCM Agreement and as stipulated in any questionnaire utilized by the SCM Committee, for example G/SCM/6/Rev.1.

¹³ For LDC Members, and developing country Members with an annual share of the global volume of marine capture production not exceeding 0.8 per cent as per the most recent published FAO data as circulated by the WTO Secretariat, the notification of the additional information in this subparagraph may be made every four years.

¹⁴ The term "shared stocks" refers to stocks that occur within the EEZs of two or more coastal Members, or both within the EEZ and in an area beyond and adjacent to it.

¹⁵ For multispecies fisheries, a Member instead may provide other relevant and available catch data.



also promptly inform the Committee of any changes to such measures thereafter, and new measures taken to implement the prohibitions set out in Article 3.

- 8.4 Each Member shall, within one year of the date of entry into force of this Agreement, provide to the Committee a description of its fisheries regime with references to its laws, regulations and administrative procedures relevant to this Agreement, and promptly inform the Committee of any modifications thereafter. A Member may meet this obligation by providing to the Committee an up-to-date electronic link to the Member's or other appropriate official web page that sets out this information.
- 8.5 A Member may request additional information from the notifying Member regarding the notifications and information provided under this Article. The notifying Member shall respond to that request as quickly as possible in writing and in a comprehensive manner. If a Member considers that a notification or information under this Article has not been provided, the Member may bring the matter to the attention of such other Member or to the Committee.
- 8.6 Members shall notify to the Committee in writing, upon entry into force of this Agreement, any RFMO/A to which they are parties. This notification shall consist of, at least, the text of the legal instrument instituting the RFMO/A, the area and species under its competence, the information on the status of the managed fish stocks, a description of its conservation and management measures, the rules and procedures governing its IUU fishing determinations, and the updated lists of vessels and/or operators that it has determined as having been engaged in IUU fishing. This notification may be presented either individually or by a group of Members.¹⁶ Any changes to this information shall be notified promptly to the Committee. The Secretariat to the Committee shall maintain a list of RFMO/As notified pursuant to this Article.
- 8.7 Members recognize that notification of a measure does not prejudice (a) its legal status under GATT 1994, the SCM Agreement, or this Agreement; (b) the effects of the measure under the SCM Agreement; or (c) the nature of the measure itself.
- 8.8 Nothing in this Article requires the provision of confidential information.

¹⁶ This obligation can be met by providing an up-to-date electronic link to the notifying Member's or other appropriate official web page that sets out this information.

In addition to the substantive disciplines described above, the Agreement also includes provisions related to notification and transparency, which are found in Article 8.

Article 25 of the ASCM already requires members to notify all their subsidies (as defined in paragraph 1 of its Article 1) that are specific within the meaning of Article 2 of the ASCM. Notifications must include the form of the subsidy, the amount provided, the policy objectives, the duration of the program, and statistical data permitting an assessment of the trade effect of a measure. Discussions on transparency and notification in the context of the Agreement on Fisheries Subsidies focused on what additional information members should be required to provide on top of existing ASCM requirements, keeping in mind the need to ensure that information is available to monitor the Agreement and also that what is required is practicable for everyone.



Article 8 of the Agreement sets out a combination of mandatory and less strict notification requirements. For each fisheries subsidy program, members agree to notify the type or kind of fishing activity for which the subsidy is provided (Article 8.1(a)). Other information has to be provided “to the extent possible,” (Article 8.1(b)), including regarding (i) the status of stocks in subsidized fisheries, relevant reference points, and whether these stocks are shared with other members or managed by an RFMO/A; (ii) conservation and management measures for these stocks, (iii) the name and identification number of subsidized vessels, (iv) the fleet capacity in subsidized fisheries, and (v) catch data in these fisheries. A footnote allows LDC members and developing country members accounting for less than 0.8% of global marine capture production to provide this additional fisheries-related information every 4 years instead of every 2 years.

Independently of subsidies, Article 8 includes a number of other transparency requirements. On IUU fishing, members have an obligation to notify the committee each year of a list of the vessels or operators that have been subject to an IUU fishing determination made by domestic authorities (Article 8.2). Separately, under Article 3.3, each IUU fishing determination needs to be notified to the Committee at the moment it is made. Other transparency obligations relate to the measures taken by members to implement and administer the Agreement (Articles 8.3 and 3.5), to members’ fisheries regime (Article 8.4), and to the RFMO/As to which they are party (Article 8.6). These obligations are of a less regular nature, requiring members to provide the relevant information once, and then again only if there are changes to the relevant information—for example, new implementation measures, a change in the fisheries regime, or a new RFMO/A to which a member becomes a party. Importantly, there is also specific language clarifying that nothing in the article requires the release of confidential information.

Summary Box: Notification and transparency

Obligation to Provide Fisheries-related Information in Subsidy Notifications

As part of their regular subsidy notifications to the WTO, members must provide information, for each subsidy, on the type or kind of fishing activity that is subsidized.

As far as possible, they must also provide information on: (1) stock status, (2) conservation and management measures, (3) identification of subsidized vessels, (4) fleet capacity, and (5) catch.

SDT: LDCs and developing country Members accounting for less than 0.8% of global catch can provide this additional information every 4 years instead of every 2 years.

Other Transparency Obligations

Members must also fulfil transparency requirements by providing information on:

- an IUU vessel list (annually) and IUU determinations (when they are made);
- implementation measures taken by their authorities;
- their domestic fisheries regime; and
- the RFMO/As they are party to.



8.0 Institutional Issues and Dispute Settlement

Relevant provisions

ARTICLE 9: INSTITUTIONAL ARRANGEMENTS

- 9.1 There is hereby established a Committee on Fisheries Subsidies composed of representatives from each of the Members. The Committee shall elect its own Chair and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of this Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.
- 9.2 The Committee shall examine all information provided pursuant to Articles 3 and 8 and this Article not less than every two years.
- 9.3 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.
- 9.4 Not later than five years after the date of entry into force of this Agreement and every three years thereafter, the Committee shall review the operation of this Agreement with a view to identifying all necessary modifications to improve the operation of this Agreement, taking into account the objectives thereof. Where appropriate, the Committee may submit to the Council for Trade in Goods proposals to amend the text of this Agreement having regard, inter alia, to the experience gained in its implementation.
- 9.5 The Committee shall maintain close contact with the FAO and with other relevant international organizations in the field of the fisheries management, including relevant RFMO/As.

ARTICLE 10: DISPUTE SETTLEMENT

- 10.1 The provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Dispute Settlement Understanding (DSU) shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.¹⁷
- 10.2 Without prejudice to paragraph 1, the provisions of Article 4 of the SCM Agreement¹⁸ shall apply to consultations and the settlement of disputes under Articles 3, 4 and 5 of this Agreement.

¹⁷ Subparagraphs 1(b) and 1(c) of Article XXIII of the GATT 1994 and Article 26 of the DSU shall not apply to the settlement of disputes under this Agreement.

¹⁸ For purposes of this Article, the term "prohibited subsidy" in Article 4 of the SCM Agreement refers to subsidies subject to prohibition in Article 3, Article 4 or Article 5 of this Agreement.



ARTICLE 11: FINAL PROVISIONS

[...]

11.2

- (a) This Agreement, including any findings, recommendations, and awards with respect to this Agreement, shall have no legal implications regarding territorial claims or delimitation of maritime boundaries.
- (b) A panel established pursuant to Article 10 of this Agreement shall make no findings with respect to any claim that would require it to base its findings on any asserted territorial claims or delimitation of maritime boundaries.²⁰

11.3 Nothing in this Agreement shall be construed or applied in a manner which will prejudice the jurisdiction, rights and obligations of Members, arising under international law, including the law of the sea.²¹

11.4 Except as otherwise provided, nothing in this Agreement shall imply that a Member is bound by measures or decisions of, or recognizes, any RFMO/As of which it is not a party or a cooperating non-party.

11.5 This Agreement does not modify or nullify any rights and obligations as provided by the SCM Agreement.

²⁰ This limitation shall also apply to an arbitrator established pursuant to Article 25 of the Dispute Settlement Understanding.

²¹ Including rules and procedures of RFMO/As.

The Agreement also includes provisions on institutional arrangements, in particular regarding the important task of monitoring WTO members' implementation of their obligations. Article 9 establishes a committee to oversee the new rules and sets out what its work would be. The Committee on Fisheries Subsidies will meet twice a year. It is tasked with reviewing the operation of the Agreement annually (Article 9.3) and examining all the information provided by members in their notifications not less than every 2 years (Article 9.2). With a view to improving the way the Agreement operates, Article 9.4 also provides for a more in-depth review to be undertaken 5 years after the treaty's entry into force, and then every 3 years. This exercise could lead to proposals to amend the Agreement based on the experience gained in implementing its provisions.

Summary box: Institutional arrangements

The Committee on Fisheries Subsidies will meet at least twice a year. It is tasked with reviewing the operation of the agreement annually and examining all notifications at least every 2 years. After 5 years and then every 3 years, it will undertake a more detailed review of the operation of the agreement and recommend any modifications to improve it.



9.0 Dispute Settlement and Final Provisions

Article 10 of the Agreement establishes that, broadly, the existing rules under the WTO's dispute settlement mechanism will apply to this new instrument (Article 10.1). One variation from the existing rules on the settlement of disputes is that, under this agreement, members would not be able to bring “non-violation” complaints—that is, complaints that an expected benefit under the agreement has been nullified or impaired, even if this is not caused by an actual violation of the agreement's provisions. The Agreement also provides that the specific procedures applicable to subsidy disputes under Article 4 of the ASCM applies to disputes under the main substantive articles of this agreement (Article 10.2).

Members will not be able to use unilateral trade policy remedies (such as countervailing duties) with respect to the obligations under the new fisheries subsidies agreement. Rather, they must use the multilateral dispute settlement process and be authorized to take action in response to subsidies found to be in breach of the Agreement's rules. If ever there were a finding by a dispute settlement panel that a member had not brought measures into conformity with the new agreement, another member could take retaliatory action in the form of “appropriate countermeasures,” a somewhat vague term that would probably need to be given meaning in a specific context by a dispute settlement compliance panel, should the need arise.

A final but very important issue relates to situations where the jurisdiction over maritime areas is disputed: for example, if an IUU determination or a determination that a stock is overfished is made in disputed waters. Article 11.2(a) clarifies that the Agreement and the legal proceedings involved in its application would have no legal implications with regard to questions of territoriality or delimitation of maritime jurisdiction. More explicitly, Article 11.2(b) also clarifies that dispute settlement panels “shall make no findings” that would require them to base such findings on “any asserted territorial claims or delimitation of maritime boundaries.” In other words, panels will need to refrain from making any finding that would imply that one particular territorial claim prevails over another. If, however, a panel determines that particular findings can be made without being based on such asserted claims, it will be able to make those findings. Interestingly, the drafting suggests that any WTO member could assert that a claim under dispute related to disputed waters.

Finally, Article 11.3 more generally provides that nothing in the Agreement should be interpreted to prejudice the rights and obligations of members under other sources of international law. Article 11.4 also clarifies that the Agreement's provision shall not imply that any member is bound by an RFMO/A decision, or that they recognize an RFMO/A, if they are not a party or cooperating non-party to such RFMO/A.



Summary Box: Dispute settlement and final provisions

Existing rules under the WTO's dispute settlement mechanism, except those related to non-violation complaints, apply to the Agreement, as do the specific procedures for subsidy disputes established in Article 4 of the ASCM.

The Agreement's provisions may not be applied in a way that prejudices the jurisdiction, rights, or obligations of members under international law.

The Agreement and findings related to it have no legal implications for territorial claims or the delimitation of maritime boundaries.

WTO panels established to settle disputes under the Agreement shall not make any findings if such findings would need to be based on any asserted territorial claims or delimitation of maritime boundaries.



10.0 Toward a “Comprehensive” Agreement: Rules related to overcapacity and overfishing

Relevant provisions

ARTICLE 12: TERMINATION OF AGREEMENT IF COMPREHENSIVE DISCIPLINES ARE NOT ADOPTED

If comprehensive disciplines are not adopted within four years of the entry into force of this Agreement, and unless otherwise decided by the General Council, this Agreement shall stand immediately terminated.

The WTO Agreement on Fisheries Subsidies establishes important new multilateral rules on fisheries subsidies, but it is only a partial agreement. At MC12 in June 2022, WTO members were not able to agree on all the rules that were envisaged.

The negotiation's 2005 mandate and SDG 14.6 explicitly refer to the prohibition of certain forms of fisheries subsidies that contribute to excessive fishing effort and capacity. Members could not, however, find consensus on a broader, and somewhat more direct, rule that would have prohibited subsidies that contribute to overcapacity and overfishing. This rule was an integral part of the package of disciplines negotiated in the lead-up to MC12. It would have established a general prohibition on subsidies “that contribute to overcapacity and overfishing,” specifying that such subsidies include an illustrative list of particular subsidy types—which are generally considered the most likely to incentivize overfishing and overcapacity (WTO, 2022b).

The list included subsidies related to vessel construction, acquisition, and modernization; the purchase of machines and fishing equipment; the purchase of fuel, ice, and bait; the costs of personnel, social charges, or insurance; income support; price support of fish caught; at-sea support; support to cover operating losses; and support targeting fishing beyond the subsidizing member's EEZ. Listed subsidy types were thus deemed to contribute to overfishing and overcapacity, but the list was not an exhaustive one, which meant that other subsidies could also be prohibited under that rule if they were shown to contribute to excessive fishing effort or fishing capacity.

Importantly, two types of flexibilities were envisaged under that prohibition. First, any member could have continued providing the subsidies covered by the prohibition in situations where it could show that measures were “implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level.” The text did not explicitly require a subsidizing member to demonstrate that fisheries management measures were effective at maintaining a stock at a sustainable level to be able to invoke this exemption, although this was presumably the objective of the measures, and the flexibility.



Second, a series of temporary and permanent exemptions from the rule for developing members was also envisaged. These flexibilities included: (a) a temporary exemption for developing members' subsidies to fishing in their EEZ and under RFMO/As, (b) a permanent exemption for developing members' subsidies to artisanal fishing, and (c) a permanent exemption for subsidies by developing members' accounting for less than a certain percentage of global catch. Importantly, the exact parameters of these exemptions were still under discussion when MC12 started.

In addition to that broad prohibition, another draft rule would have prohibited the provision of subsidies targeted at—the exact language was “contingent upon, or tied to”—fishing and fishing-related activities beyond the subsidizing member's EEZ. This rule would have covered those subsidy programs specifically designed for distant-water fishing or which, in practice, provide the bulk of their benefit to distant-water fishing.

Members' inability to reach agreement on these rules, and in particular on the broader prohibition of subsidies that contribute to overcapacity and overfishing, was a real disappointment for many delegations. The compromise that was found to allow the conclusion of the Agreement, even if it did not include all the disciplines that had been discussed, was that members committed to continue negotiations to agree on comprehensive disciplines “with a view to making recommendations [on further rules] to the Thirteenth WTO Ministerial” (WTO, 2022a, p. 1).

To strengthen the credibility of this commitment, an innovative termination clause was included in Article 12 of the Agreement. This provision provides that if comprehensive rules are not agreed in the four years that follow the entry into force of the Agreement, then the treaty will be terminated, unless members decide otherwise. The Agreement will enter into force when two thirds of members – that is, 110 of them – have deposited their instrument of acceptance with the WTO. It is at that point that the four-year period referred to in Article 12 will start.

Summary Box: Termination clause

If WTO members do not agree on further, more comprehensive disciplines in the 4 years following the entry into force of the new rules, the Agreement shall be terminated, unless members decide otherwise.



Conclusion

Overall, the agreement reached in June 2022 represents an important step forward in building coherence between fiscal, environmental, and development policy. While not all of the rules on the table were agreed, and negotiations continue, the rules established address several situations where subsidies carry a very high risk of undermining sustainable, legal fishing. The agreement also sets up an important framework for discussion and analysis of subsidies and their implications for sustainable fishing.



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