

Could the WTO Save the Oceans?

An Inquiry into the Role of the WTO in the Future of Fisheries Policies

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18.1 INTRODUCTION

The fisheries subsidies mandate of the World Trade Organisation (WTO) recently celebrated its twentieth birthday. Somewhat clarified and reshaped over the years, the mandate remains only partially fulfilled.¹ The 12th WTO Ministerial Conference (MC12), scheduled to take place in November–December 2021, at which the negotiations were hoped to finally be concluded, was postponed indefinitely due to a new outbreak of the COVID virus. While fish stocks are at risk of further depletion in the face of increasingly capable fleets, among other hazards, the WTO Members need to take pragmatic yet ambitious steps as a matter of urgency, in order to be able to contribute to the search for solutions.

Analytical reflections, whenever they are present, are fully the author's own, as are possible mistakes in the assessment.

¹ Substantive work on this chapter was concluded before the “light” version of a self-standing Fisheries Subsidies Agreement was adopted as a rushed part of the WTO MC12 outcomes on 17 June 2022, being integrated in the Annex 1A to the WTO Agreement. The text of the Fisheries Subsidies Agreement could be found in the Annex to the dedicated WTO Ministerial Decision (WT/MIN(22)/33WT/L/1144, 22 June 2022). The instrument regulates subsidies contributing to IUU fishing and subsidies regarding overfished stocks offering generous yet time barred SDT exemptions. The WTO Members were not able to reach consensus on the third, key, substantive pillar – subsidies contributing to overcapacity and overfishing. As a result, only some elements thereof (the prohibition of all subsidies to fishing or fishing related activities in the unregulated high seas and the due restraint provision relating to subsidies to vessels not flying the flag of the subsidizing Member) have entered the text. According to Article 12 of the Agreement, read in conjunction with paragraph 4 of the Ministerial Decision, the longevity of the new treaty is subject to agreeing on “additional provisions that would achieve a comprehensive agreement on fisheries subsidies, including through further disciplines on certain forms of fisheries subsidies that contribute to overcapacity and overfishing”, subject to effective special and differential treatment. In case no agreement on this open agenda would be reached within 4 years, the Fisheries Subsidies Agreement shall automatically terminate. Accordingly, most of the points raised in this Chapter retain their relevance.

The WTO is authorised to reduce (or even eliminate) fisheries subsidies through new rules to be integrated in its framework and enforceable via its own dispute settlement mechanism (DSM). This task is not common for a body mostly concerned with trade regulation rather than sustainability (which is treated in a somewhat restricted manner through exceptions), or, even more broadly, the law of the sea. However, if accomplished, it would contribute to current ocean governance through restricting financial inflows into enhancement of the fishing effort, which is damaging for stocks.

Meanwhile, lacking fishing management-related experience or capacity to develop it, the WTO is bound to rely on the procedures and findings of specialist fisheries management bodies as triggers for its disciplines. This requires efficient interaction with other ocean governance players not only throughout negotiations but also (or even more so) during implementation of a future agreement. Similarly, the WTO is inevitably put into the network of the core law-of-the-sea notions embodied in the United Nations Convention on the Law of the Sea (UNCLOS) and related binding and soft law instruments, as well as their implementation.

Having first addressed the impediments encountered by the WTO Negotiating Group on Rules (NGR) despite mounting pressure to deliver, which the Group faces (I), this chapter will further proceed with briefly outlining the history of fisheries subsidies negotiations at the WTO (II); present the factors attracting fisheries subsidies issues to the Organisation (III); explore the potential for integration of disciplines-to-be within the WTO framework already regulating subsidies (IV); and detail and analyse the three key disciplines under discussion, assessing the viability and enforceability of their potential contributions to the Rule of Law for the oceans (V).

18.2 THE [POORLY SHAPED] PRESSURE TO DELIVER: IMPEDIMENTS FACED BY WTO NGR NEGOTIATORS

An aspiring wish list for the future WTO Fisheries Subsidies Agreement includes numerous and varied entries. In particular, the outcome is expected to (to name a few): respect the mandate(s); show due care for fish; account for developing concerns; duly interplay with the other Sustainable Development Goals (SDGs) and their targets;² integrate into both the legal framework of the WTO (its Single [Legal] Undertaking) and that of the other fora concerned with fisheries management; be [immediately] implementable; balance the three groups of sustainability concerns (i.e., environmental, social and economic); and prove the ongoing relevance of the multilateral trading system (MTS) embodied in the WTO.³ In the meantime, one

² Among those – selected targets of the SDG 1, 2, 5, 8, 9, 10, 14, 16 and 17. See UN, 2015. *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1.

³ WTO 2019 Public Forum Working Session “How Millennials could be of help in understanding and resolving the hurdles of the multilateral trading system, making it [more] inclusive and development-oriented?” Closing remarks. WTO, 10 October 2019.

other objective – attesting that SDG [early] deadlines could be respected – was missed when the negotiators were unable to reach a deal by the end of 2019.

Despite enhanced attention to future fisheries subsidies disciplines, their sense, scope and dimensions are not well known or understood outside of the WTO negotiating rooms. Even more so, WTO and fisheries experts are each often able to see only part of the picture (e.g., ‘subsidies’ and ‘fisheries’, respectively), whereas other stakeholders demand delivery ‘as is’, not paying enough attention to the manifold technicalities that have so far emerged along the way. Lack of transparency over the progress of negotiations for over a decade⁴ has contributed towards misperceptions and misunderstandings and, arguably, inhibited the establishment of working relationships between the WTO and other international organisations and arrangements operating in fisheries and/or fisheries management. These issues were partially addressed through publication of the evolving NGR chair’s draft texts in May,⁵ June⁶ and November⁷ 2021, the explanatory notes thereto⁸ and the draft text of the agreement, expected to be considered during the MC12,⁹ also accompanied by an explanatory note.¹⁰ Nonetheless, the documents evidenced the existence of numerous disagreements, reflected in square brackets and placeholders.

Interaction between the WTO and the other ‘fisheries’ players will be necessary in implementation of the new agreement. The negotiators have indeed benefited from the knowledge shared by fisheries experts invited to participate in the technical sessions of the fisheries subsidies negotiations clusters and in the side events, as well as through studies and datasets on specific topics prepared in support of the negotiations. However, this is a ‘one-way street’ since news pertaining to progress in developing WTO fisheries rules did not necessarily spread. As a result, effective

⁴ TN/RL/W/213, 30 November 2007, Negotiating Group on Rules, Draft Consolidated Chair Texts of the Antidumping and Subsidies and Countervailing Measures Agreements, and TN/RL/W/232, Page C-1, Annex C – Fisheries Subsidies.

⁵ TN/RL/W/276, 11 May 2021, Negotiating Group on Rules, Fisheries Subsidies: Draft Consolidated Chair Text.

⁶ TN/RL/W/276/Rev.1, 30 June 2021, Negotiating Group on Rules, Fisheries Subsidies: Revised Draft Consolidated Chair Text: revision.

⁷ TN/RL/W/276/Rev.2, 8 November 2021, Negotiating Group on Rules, Fisheries Subsidies: Revised Draft Text: revision.

⁸ TN/RL/W/276/Add.1, 11 May 2021, Negotiating Group on Rules, Fisheries Subsidies: Draft Consolidated Chair Text. Chair’s Explanatory Note Accompanying TN/RL/W/276. Addendum. With corrections made on 9 June 2021; TN/RL/W/276/Rev.1/Add.1, 30 June 2021, Negotiating Group on Rules, Fisheries Subsidies: Revised Draft Consolidated Chair Text. Chair’s Explanatory Note Accompanying TN/RL/W/276/Rev.1. Addendum; TN/RL/W/276/Rev.2/Add.1, 8 November 2021, Negotiating Group on Rules – Fisheries subsidies – Revised draft text – Chair’s explanatory note accompanying TN/RL/W/276/Rev.2. Addendum.

⁹ WT/MIN(21)/W/5, 24 November 2021, Ministerial Conference - Twelfth Session – Geneva, 30 November – 3 December 2021 – Agreement on fisheries subsidies – Draft text.

¹⁰ WT/MIN(21)/W/5/Add.1, 24 November 2021, Ministerial Conference – Twelfth Session – Geneva, 30 November – 3 December 2021 – Agreement on fisheries subsidies – Draft text – Addendum.

contributions from many of the fisheries specialists were disabled. Worse, the risk is that the outcome might make those same specialists somewhat reluctant to participate in implementing an unknown deal, fearing that its design might have a negative impact on the other initiatives.

The same prolonged lack of transparency has also made academic inquiry into the matter more complicated. This is because most of the submissions and communications by the Members, as well as other working papers, are restricted. In addition, in the past (up until May 2021, when the first version of the new NGR chair's consolidated text was shared beyond WTO walls), summaries or updates rarely reached the public domain. In combination, these factors were impeding holistic and objective analysis from being accomplished and/or published.

18.3 FISHERIES SUBSIDIES AT THE WTO: THE HISTORY

The history of WTO fisheries subsidies negotiations dates back to 1995. Then, right after establishment of the Organisation, issues related to the harmful effects of these subsidies on fish stocks were raised before the WTO Committee on Trade and Environment. The Committee started by updating itself on recent developments in the area, for instance, through studying Articles 11.2 and 11.3 of the Food and Agriculture Organisation of the United Nations (FAO) Code of Responsible Fisheries, devoted to responsible trade; laws and regulations relating to the fish trade and addressing sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBT) measures, tariffs and non-tariff measures, relevant technology transfer requirements, transparency and cooperation.¹¹

Inquiring into the core of the phenomenon, one of the proponents of establishing the disciplines in the area recognised: 'Fisheries subsidies, irrespective of whether they take the form of cost reduction or price supports, encourage increased fishing effort. Thus, fisheries subsidies exacerbate the already serious common property problem of ocean fisheries . . .'.¹² On the other hand, an alternative approach has also started to crystallise. This approach – supported by Japan, among others – emphasises fisheries management rather than fisheries subsidies, as a result, advocating in favour of establishing considerably more modest and selective effect-based disciplines.¹³

¹¹ Brought to the attention of the WTO Members by the Note of the WTO Secretariat on Trade measures for environmental purposes taken pursuant to multilateral environmental agreements: recent developments, WT/CTE/W/15, 15 December 1995.

¹² WT/CTE/W/11, 11 March 1999. On the Environmental Impact of Fisheries Subsidies, A short report by the Icelandic Ministry of Fisheries, 1 February 1999, Submission by Iceland.

¹³ WT/GC/W/221, 28 June 1999, Preparations for the 1999 Ministerial Conference, Negotiations On Forestry And Fishery Products, Communication From Japan; and PRESS/TE/036, 6 July 2001, UNEP and MEAs Participate In CTE Information Session on Compliance and Dispute Settlement. CTE Discusses WTO-MEA Relationship, Domestically Prohibited Goods, Biodiversity Convention and TRIPS Agreement, Eco-Labeling, and Fisheries Subsidies Reform.

Numerous submissions – mostly by the Friends of Fish: Iceland, New Zealand, the United States, Australia, Chile, Peru and Norway – have addressed many of the core points, including a drastic lack of transparency over fisheries subsidies granted by WTO Members,¹⁴ posing real difficulties in terms of estimating the true impact of those subsidies. As a result, the first ever draft version of the WTO fisheries subsidies mandate, introduced during the MC₃ in Seattle (yet never adopted), comprehensively captured most of the important elements of the discussions-to-be. It addressed ‘certain subsidies that may contribute to over-capacity in fisheries and over-fishing’; provided that ‘the work on fisheries subsidies shall be carried out in cooperation with the FAO and drawing also on relevant work under way within other intergovernmental bodies, including RFMOs’ and included ‘identification and examination of subsidies which contribute to over-capacity in fisheries and over-fishing’ and ‘the clarification and strengthening, as appropriate of disciplines under the Agreement on Subsidies and Countervailing Measures (SCM) with respect to such subsidies ...’.¹⁵ However, it is important to note that the mandate as drafted had an additional, purely ‘trade-related’ facet, which has gradually disappeared as the work progressed. Namely, it was also dealing with fisheries subsidies that ‘cause other adverse effects to the interests of Members’ and ‘have trade-distorting effects’.¹⁶ The only area not addressed by the Seattle fisheries draft, which has later become a central element of the mandate, was that of development.

After the failure of the Seattle Ministerial to deliver,¹⁷ unrelated to fisheries subsidies, a much more modest version of the relevant mandate was introduced in paragraph 28 of the Doha Ministerial Declaration.¹⁸ This referred to clarification and improvement of the ‘WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries’ within the framework of ‘negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures’. This provision was supplemented by a broadly phrased undertaking to negotiate on ‘the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services’ (non-specific to fisheries subsidies) in paragraph 31 (iii) of the same Declaration. The dual – trade and environmental – emphasis was thus, for the moment, preserved.

A largely identical mandate was restated in paragraph 28 of the 2005 Hong Kong Ministerial Declaration.¹⁹ However, in paragraph 9 of its Annex D, the same instrument, in addition, explicitly referred to ‘prohibition of certain forms of fisheries

¹⁴ David J. Douman, *An Overview of World Fisheries: Challenges and Prospects for Achieving Sustainable Resource Use*, April 1996, 16, quoted in ITEM 6, fisheries sector – submission by New Zealand, WT/CTE/W/52, 21 May 1997.

¹⁵ Seattle (MC₃) draft ministerial declaration, Para II(3)(a).

¹⁶ *Ibid.*

¹⁷ Report of the Third Ministerial Meeting of WTO, CUTS International, available at <https://cuts-citec.org/report-of-the-third-ministerial-meeting-of-wto/>.

¹⁸ WT/MIN(01)/DEC/1, 20 November 2001.

¹⁹ WT/MIN(05)/DEC, 22 December 2005.

subsidies that contribute to overcapacity and over-fishing’, also containing a much more elaborate special and differential treatment (SDT) clause.

The NGR chair’s Draft 2007,²⁰ even if not having normative value, is also worth a mention, since it has influenced the future of the negotiations in at least two respects. The first is by offering a definition of fisheries subsidies, containing an explicit reference to their ‘specificity’ (by suggesting, in Article I.1, that ‘... the following subsidies within the meaning of paragraph 1 of Article 1, to the extent they are specific within the meaning of paragraph 2 of Article 1, shall be prohibited’. The second is by introducing an extra negotiation track for subsidies to fishing on overfished stocks (Article I.2: ‘In addition to the prohibitions listed in paragraph 1, any subsidy referred to in paragraphs 1 and 2 of the Article 1 [listing varied types of capacity-enhancing subsidies] the benefits of which are conferred on any fishing vessel or fishing activity *affecting fish stocks that are in an unequivocally overfished condition shall be prohibited*’ (emphasis added). Both these items remain on the agenda up until today.

The situation evolved in late 2015 with adoption of SDG’s, in particular, SDG 14.6, designed to ‘by 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and refrain from introducing new such subsidies ...’. The prohibitory language of SDG 14.6 was picked up by the Ministerial statement of the 10th WTO Ministerial Conference (MC10), supported by some twenty-six WTO Members²¹ and, later, the Ministerial Decision on Fisheries Subsidies²² of the 11th WTO Ministerial Conference (MC11) in which, expanding the prior mandate, the Members agreed ‘to continue to engage constructively in the fisheries subsidies negotiations building up on the progress already made ... , with a view to adopting, by the Ministerial Conference in 2019, an agreement on comprehensive and effective disciplines that prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU-fishing ...’. This way, the mandate was supplemented by reference to Illegal, Unreported and Unregulated (IUU) fishing, and now contains two de-jure and three de-facto substantive elements.

In addition to these elements, the exact language of the mandate clearly evidences its evolution, starting from ‘clarification’ and reaching achieving agreement on new ‘comprehensive and effective disciplines’.

18.4 FACTORS ATTRACTING THE ISSUE TO THE WTO AGENDA

The initial reason for introducing fisheries subsidies on to the WTO agenda seems to be clear. That is: the [once] strong dispute settlement that could extend to

²⁰ TN/RL/W/213, 30 November 2007, Draft Consolidated Chair Texts on the AD and SCM Agreements, Annex VIII, Fisheries Subsidies, 87–93.

²¹ WT/MIN(15)/37, 19 December 2015, para. 2.

²² WT/MIN(17)/64, WT/L/1031, 18 December 2017.

ensuring compliance with these trade-related obligations,²³ albeit mostly grounded in environmental sustainability. Redress for violating the fisheries governance rules is underexplored elsewhere, especially as far as the domain of capacity-enhancing subsidies is concerned, the one originally submitted for creation of the WTO rules-to-be. In this area, fisheries management plans, quasi-voluntary in nature, currently predominate. This leaves States questioning their neighbours' conservation efficiency to resort either to a) reinforcing it through technical assistance and enhancing cooperation within the framework of free trade agreements (FTAs) or fishing access agreements (FAAs), or b) adopting unilateral trade-restrictive measures, some of which were even contested before the General Agreement on Tariffs and Trade (the GATT) and WTO panels,²⁴ also featuring parallel counter-proceedings elsewhere.²⁵ In this light, the desire to legitimise at least some conservation measures within the global trade order looks justified, at least beyond the capriciousness of the GATT Article XX(g) exception. The situation with the IUU disciplines, joined to the WTO fisheries subsidies mandate, appears to be similar. However, arguably, these are already subject to harsher enforcement mechanisms. Despite the recent entry into force of the UN Port State Measures Agreement (PSMA),²⁶ as of now, such arrangements are predominantly of a unilateral nature.

Other factors of attraction – though arguably of comparatively less significance – include, for example, the nature of the measure, bearing in mind that the GATT, followed by the WTO, has significant experience in putting together, implementing and enforcing varied subsidies rules, proving that the subject matter of the new deal – fisheries/fish – is not foreign to the WTO, having been subject to market access measures, including tariffs and non-tariff measures (NTMs), such as SPS, TBT, transit and export/import restrictions. It might be also argued that the rules on fisheries subsidies could potentially benefit from peer pressure enhancing compliance, ensured by the institutional structure of the WTO. Finally, after the change of circumstances these days, in particular, the demise of the WTO Appellate Body (AB) and the resulting crisis of the WTO dispute settlement mechanism as a whole, the mandate remains on the agenda thanks to the *pacta sunt servanda* principle, supported by the efforts made in clarifying it earlier.

²³ Jaemin Lee, Looking for a Panacea in the SCM Agreement? Systemic Challenges for Post-Bali Fisheries Subsidies Discussion and Some Food for Thought to Overcome Them (2014) *Asian Journal of WTO & International Health Law and Policy*, Vol. 9, 477.

²⁴ EU – Measures on Atlanto-Scandian Herring: Request for Consultations by Denmark in Respect of the Faroe Islands, WT/DS469/1, G/L/1058 and Chile–Measures Affecting the Transit and Importation of Swordfish: Request for Consultations by the European Communities, WT/DS193/1, G/L/367. Both cases were settled before establishment of a panel.

²⁵ M. A. Orellana, The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO (2002) *Nordic Journal of International Law*, Vol. 77, Issue 1, 55–81.

²⁶ Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing 2009, UNTC, vol. 54133.

18.5 SQUARING THE NEW SUBSIDIES WITH WTO SUBSIDIES DISCIPLINES

If adopted, the Agreement on Fisheries Subsidies would become the fourth covered agreement addressing subsidy matters at the WTO, after the GATT, the Agreement on Agriculture (AoA) and the Agreement on Subsidies and Countervailing Measures (SCM). It should be noted that the principle of effectiveness requires that the ‘provisions [of the WTO agreements] are read in a coherent and consistent manner which gives full and effective meaning to all of their terms’.²⁷ Remarkably, while both the SCM and the AoA have adopted different regulatory approaches and structural solutions, they seem to overlap in attributing different weight to different types of subsidies, the SCM – through the ‘traffic light’ approach, while the AoA – via its boxes. This results in stricter treatment of the most trade-distorting measures. In the SCM, more restraining treatment is, for instance, reserved for the case of export subsidies, which, together with import substitution subsidies, forms the ‘prohibited subsidies’ category. While the SCM prohibited such subsidies from the start by virtue of its Article 3(1)(a), the AoA in its Part V (Articles 8–11) first subjected them to detailed regulation. This, however, was also later followed by the prohibition introduced through the Ministerial Decision on Export competition in the Bali Ministerial package,²⁸ which is now subject to gradual implementation. The typologies are closely linked to the issue of enforceability, with the more stringent disciplines being subject to better streamlined procedures.

Even should the Fisheries Subsidies Agreement be integrated into the SCM, its distinctive character and pursuit of non-trade objectives would certainly make it stand out as a *lex specialis* with respect to the other, general, subsidies rules incorporated therein. Fisheries (like other) subsidies are already covered by the SCM disciplines as far as their trade-related effects are concerned. Most of these subsidies are actionable, which means that a Member contesting a measure should be able, as per Part III of the SCM, to show (and quantify) adverse trade effects. As was suggested by Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines and the United States during early elaboration of the Doha Mandate,

subsidised production reduces the access of existing and potential participants to fisheries, as well as to markets. Subsidies that limit others’ access to stocks are trade-distorting, because in altering production patterns they necessarily alter trade patterns. . . . The effects of such subsidies might be to keep unsubsidised catches

²⁷ AB Report, US – Upland Cotton, paras. 549–550; AB Report, EC – Large Civil Aircraft, para. 1054, and Debra P. Steger, The Subsidies and Countervailing Measures Agreement: Ahead of Its Time or Time for Reform? (2010) *Journal of World Trade*, Vol. 44, Issue 4, 779–796, at 782.

²⁸ WT/MIN(13)/40 and WT/L/915, 11 December 2013.

at low levels where they would otherwise have increased. . . . If subsidised fishers deplete a shared stock, all other fishers lose access to that stock, not merely those competing alongside the subsidised product at market.²⁹

The same submission further noted that the distortions caused by the fisheries subsidies might be difficult to address under the SCM Agreement, operating the notions of price cuts and import impediments or displacements.³⁰ The proponents also pointed out that the task of identifying market distortions by fisheries subsidies is made more difficult by the diversity in nature of fisheries products and of the economic structures used by the industrial segment concerned.³¹

This might suggest the reasons why no cases challenging fisheries subsidies provided by a Member were ever raised before the WTO panels and the AB. The same structure proves highly impracticable if ‘trade’ effects are replaced by ‘environmental’ concerns. Nor would it meet the mandate, unambitiously calling for no less than ‘prohibition’. The fisheries subsidies rules, which are being elaborated, are not directly aimed at disciplining trade restrictive measures otherwise resorted to by the Members in the fisheries sector, such as import, export and transit restrictions. Those would likely continue their parallel existence, even though, indeed, they might be impacted by synergies created by better fisheries management practices, the introduction of which might be catalysed by the Fisheries Subsidies Agreement, or even a run-up thereto, and, where applicable, the other WTO rules disciplining trade restrictions. What is suggested is an alternative avenue. Lastly, the fisheries subsidies disciplines might be relevant in interpreting the text of GATT Article XX(g) as applied to other trade restrictive measures taken to meet conservation ends.

18.6 WHAT THE NEGOTIATIONS ARE REALLY ABOUT: THE THREE ELEMENTS OF A FUTURE DEAL

Even if it might be argued that at the core of the ongoing negotiations are disciplines tackling overcapacity and overfishing, two other additional issues are on the table. One of those – subsidies to fishing overfished stocks – was added *de facto*, not *de jure*. These three substantive areas will be assessed next.

18.6.1 *Capacity-Enhancing Subsidies (e.g., Contributing to Overcapacity and Overfishing)*

Input of overcapacity into overfishing is clear (see Chart 18.1) and widely recognised. Moreover, as the term ‘contributing’ itself suggests, even if this is not the only cause of overfishing, it remains an important one. In addition, overcapacity is the area

²⁹ TN/RL/W/3, 24 April 2002. Para. 15.

³⁰ *Ibid.*, para 16.

³¹ *Ibid.*

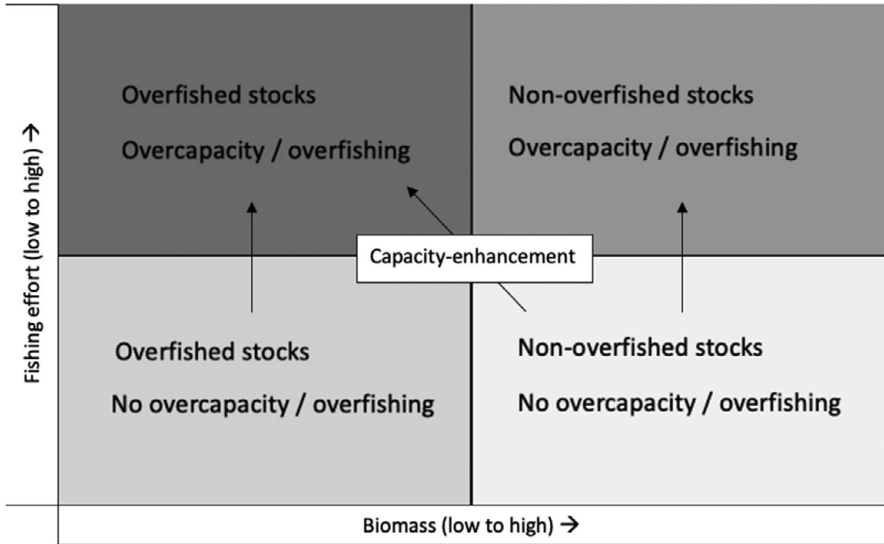


CHART 18.1. Impact of capacity-enhancing subsidies on fish stocks (on adjusted Kobe Plot)

offering most comfort to the WTO negotiators, since it largely relies on economic terms and indicators, to which they are accustomed. The impact of capacity-enhancing subsidies on the conditions of fish stocks is demonstrated on the adjusted version of the Kobe (or the phase) plot. This constituted part of the Report of the first joint meeting of the tuna RFMOs, which is used to evaluate the status of a stock based on fishing mortality (F) and biomass (B) associated with maximum sustainable yield (MSY; FMSY and BMSY).

Subsidies increasing capacity – even more so when coupled with poor or in-existent fisheries management practices – appear also to contribute to IUU. Thus, overcapacity disciplines could, in addition, curtail IUU fishing, which, as noted by Lee, is a by-product rather than a subject of subsidisation.³² Tackling a broader perspective, prohibition of certain overcapacity subsidies would make an important contribution to fisheries governance overall, since this particular issue is not pre-empted by the existing framework. That is especially so with respect to fishing on the high seas – outside the areas/ species covered by the RFMO/As, or even within them – since the measures taken by different organisations and arrangements are not identical in their efficiency. Finally, considering the migrating, straddling and shared nature of many fish stocks, which make management efforts particularly difficult, blocking enhancement of fisheries effort could be a viable addition or alternative.

³² Lee (n 22).

Even though the WTO Members seem to agree that subsidies contributing to overcapacity and overfishing have to be curtailed, reaching consensus over the way in which this result could be achieved has proven to be a difficult task. The three main approaches suggested and debated are as follows. First, the positive list approach, according to which most harmful types of capacity-enhancing fisheries subsidies would be identified and so listed and prohibited. Second, the negative effect test, according to which only capacity-enhancing subsidies negatively impacting stocks would face prohibition. And third, the approach establishing (scheduling) subsidy caps, specific to particular Members or their groups, which would limit the total allowable amount of subsidies provided, and might be subject to further reductions. These approaches were considered alone and in combination.

While the list and the caps approaches require consensus upfront – in establishing the lists and quantifying the caps respectively – the negative effect test postpones determination of what is prohibited to the future – as a matter of a highly problematic step in light of the ongoing WTO DSM impasse, the overall complexity of the WTO DSM and particular challenges fisheries subsidies might contribute thereto.

The blended approach, embodied in the latest Chair's draft, relies on the stabilised demonstrative list of prohibited subsidies (subsidies for fixed and operational costs, including fuel), followed by effect-based flexibility and exceptions incorporating certain elements used in elaborating the capping proposals. The design of these provisions implies that the setting of action is the territorial sea, EEZ or RFMO/A area. Special provisions prohibit subsidies contingent on fishing on the high seas in whole or in part, as well as subsidies to vessels flying a flag of a different Member. The flexibility tolerates capacity-enhancing subsidisation 'if the subsidising Member demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level'. Meanwhile, the exceptions reflected (save for the one devoted to disaster relief and available to all Members) are targeting low income, resource-poor or livelihood fishing, or fishing-related activities of the developing Members and LDCs in their territorial seas or EEZs. These exceptions are not only time-limited but are also subject to exemptions from eligibility, referring to the Member's share of the annual global marine capture fish production and, potentially, other indicators.

18.6.2 *Subsidies to Fishing on Overfished Stocks*

A separate stream of disciplines related to prohibition of subsidies to fishing on overfished stocks, not explicitly forming a part of the mandate, were first introduced by the chair's Draft in late 2007. These are the disciplines that have faced the most impressive dynamics, having moved from the non-existent and, next, redundant, to the core and most stringent disciplines among the proposed prohibitions.

The idea behind subsidies to fishing on overfished stocks is plausibly based on 'not going from bad to worse', that is, not depleting already 'suffering' stocks still

further. Nevertheless, the drafting solutions suggested by the Members in this respect initially tended to tweak the main aim of these disciplines by, rather, using the latter as a shield safeguarding their right to continue to subsidise fishing on overfished stocks, subject to the set conditions, for instance – a post-factum negative effect test. Unsurprisingly, this solution appeared somewhat far-fetched. The chair’s Draft contains a clear prohibition on subsidising fishing on overfished stocks, subject to flexibility allowing stock-rebuilding subsidies only, conditional on compliance with [enhanced] transparency requirements. In a sense, flexibility is structured so that it is more likely to be invoked in practice by developed countries. The disciplines are also subject to highly restrictively phrased time-limited exceptions for low-income, resource-poor or livelihood fishing or fishing-related activities in the territorial seas by developing Members and LDCs. Technically, the overfished stocks disciplines feature a very high level of reliance on stock assessment and management domains, which might seriously hamper their already limited efficiency.

Finally, after years of heated debates, Members appear to have decided not to retain the presumption of overfishing with respect to unassessed stocks. Thus, the overfishing disciplines would not apply to those stocks. While the final provisions in the draft encourage Members to exercise due restraint with respect to subsidisation of such stocks, this solution is rather weak and might disincentivise stock assessment.

18.6.3 *Subsidies to IUU Fishing*

The late-comer to the WTO fisheries subsidies mandate – ‘elimination of subsidies to Illegal, Unreported and Unregulated (IUU) fishing’ as well as fishing-related activities in support of such fishing – has an accessory flavour. The framework developed at the WTO so far, even if having accumulated a high degree of consensus, remains weak and heavily dependent on external IUU determinations by coastal States (including port States), flag States and RFMO/As. Obligations are limited to adopting, implementing and notifying to the WTO the national laws prohibiting the grant of subsidies to vessels and/or operators determined to be engaged in IUU fishing. The IUU determination triggering the prohibition is subject to positive evidence and should be conducted in line with due process standards. The expected impact of the disciplines is not fully clear and, in any case, appears to be quite modest due to the prospective injunctive (as opposed to retrospective compensatory) nature of WTO remedies. However, despite its practical insignificance, elimination of IUU subsidies discipline could conceivably be useful in supporting relevant measures taken elsewhere.³³

³³ For an overview of such measures, see S. Widjaja, T. Long, H. Wirajuda et al. 2019. *Illegal, Unreported and Unregulated Fishing and Associated Drivers*. Washington, DC: World Resources Institute. Available online at www.oceanpanel.org/iuu-fishing-and-associated-drivers.

18.6.4 *The Effective Way Forward*

While the framework of the new agreement appears to be largely in place, the Members are working on aligning their positions on several outstanding details. Key among those are the scope of flexibilities and exceptions (namely those reflecting the 'appropriate and effective' SDT), as well as institutional matters, in particular, the extent of the transparency obligation and adjustments to the WTO DSM to duly accommodate fisheries subsidies disputes. The short transitional periods, now proposed for the prohibition of subsidies to fishing on overfished stocks disciplines, seem to be based on a presumption of quick recovery of unsustainable stocks, which might be over-optimistic. Instead, a closer look might be taken at the gradual diversification in the occupational focus of the coastal communities engaged in livelihood fishing, especially in developing countries and LDCs, to allow their members to decrease their dependence on catches, even if temporarily. This might require not only additional time but also a creative strategy joined by suitable technical assistance.

In line with the considerations presented earlier in this chapter, the text, as it stands, has largely omitted stock management tasks, albeit reliance on their results as a trigger inevitably remains. This, once again, suggests that implementation of the WTO Fisheries Subsidies Agreement, when adopted, would necessitate cooperation between the WTO and the national fishing management authorities, RFMOs and RFMAs, as well as the FAO. Moreover, coordination with the work being accomplished by the UN (UNECE and UNCTAD), the OECD and the World Bank would also be useful. A key feature of this process would be to understand variable areas of competence and divide tasks, without undue usurpation of those by the 'new' player (WTO). If duly implemented, this approach would shape positive synergies.

18.7 CONCLUDING REMARKS

The contours of the potential contribution by the WTO to the Rule of Law for the Oceans are largely defined by now. It will include rules contributing to minimising financial inflows supporting enhancement of the fishing effort and so damaging stocks. These rules would be divided into three streams, shaped as prohibitions of: a) subsidies contributing to overcapacity and overfishing; b) subsidies for fishing on overfished stocks; and c) subsidies to vessels and/or operators involved in IUU fishing. Reflecting the accessory role of the WTO in ocean governance and once again emphasising that the WTO does not exist in a clinical isolation, the new disciplines are built around law of the sea notions and are relying on the efforts taken and findings made by fisheries management organisations and arrangements as triggers.

While the oceans are well-inscribed into the environmental sustainability pillar of a future agreement, which appears to feature a higher degree of convergence, the other two – social and economic sustainability – elements, are still subject to heated discussion. Indeed, a reduction in the usual state support might have a considerable impact on fishers and their communities, especially in the short term. On the other hand, the impossibility of investing in fleets could interfere with the industrialisation strategies of developing countries and LDCs, most of which, nowadays, are responsible for only an insignificant share of subsidisation due to their restricted relevant budgets. Mutually acceptable solutions to these issues are hoped to be found by the MC12, now postponed to March 2022 at the earliest due to the COVID pandemic.

The WTO fisheries subsidies negotiations are a marathon rather than a sprint. Another lap or several might be required to make sure that the agreement is ripe for delivery and subsequent implementation. On this track, every step forward is of importance to both the WTO and the oceans. A win-win outcome might well be achievable: through establishing the new, sustainability-driven subsidies rules, the WTO could help the oceans to recover, while the progress and the eventual successful conclusion of the fisheries subsidies negotiations could affirm that the WTO remains relevant and could meaningfully deliver on trade-related issues of global concern.