

Empty Harvest:

A Briefing Paper on The World Trade Organization Agreement on Fisheries Subsidies

In June 2022, at the World Trade Organization (WTO) the Agreement on Fisheries Subsidies (AFS) was agreed upon. The AFS prohibits a range of subsidies to fishing and fishers that include overfished stocks, Illegal, Unreported and Unregulated (IUU) fishing as well as fishing in unregulated waters. While the outcome has been lauded by some its failure to hold those most historically responsible for global overfishing accountable, undermining the sustainability of fish stocks while placing additional burdens on developing countries represents an empty harvest.

This campaign brief explains what the agreement means, why it shouldn't be ratified and what the next steps on fisheries subsidies negotiations should look like.

The Sustainability Mandate

The negotiations on fisheries subsidies have a long history in the WTO but were intensified following the Sustainable Development Goals (SDG). The SDG target is to “prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part” of the negotiations.

The AFS has been widely heralded by the WTO. In her Ministerial closing statement on June 17, Director General Ngozi Okonjo-Iweala stated that “on fisheries subsidies, WTO members have for the first time concluded an agreement with environmental sustainability at its heart.”¹ Going further, Deputy Director General Angela Ellard, stated “by prohibiting certain forms of fisheries subsidies, it delivers on UN Sustainable Development Goal Target 14.6 after more than 21 years of negotiations — the first SDG target fully met.”²

This claim from the WTO that the mandate of SDG14.6 has been met contradicts the outcome, both the Agreement on Fisheries Subsidies and the 2022 Ministerial Decision. The failure to include prohibitions of subsidies contributing to overfishing and overcapacity as well as appropriate and effective special and differential treatment combined with a decision for further negotiations for a comprehensive outcome clearly represent a mandate not completed.

¹ https://www.wto.org/english/news_e/spno_e/spno27_e.htm

² https://www.wto.org/english/news_e/news22_e/ddgae_26jul22_e.htm



What does the Agreement on Fisheries Subsidies Cover

Leaders had given Members a mandate under SDG14.6 to conclude an agreement that includes targeting subsidies that contribute to overfishing and overcapacity, IUU fishing as well as appropriate and effective special and differential treatment (SDT). With the AFS not addressing the issue of overcapacity and overfishing as well as SDT it is seen as an interim outcome, which includes a sunset clause, while a comprehensive agreement is negotiated.

Subsidies for Illegal, Unreported and Unregulated Fishing and small-scale fishers

The AFS prohibits subsidies to fishing that is determined to be Illegal, Unreported and Unregulated. Within the agreement it outlines who can determine whether IUU fishing has occurred and a process for doing so. While there is broad support for acting against IUU fishing there are some important considerations when it comes to small-scale fishers whom are the most vulnerable in the sector and often undertake unreported fishing.

The agreement provides a 2-year 'peace-clause' for Developing Countries and Least Developed Countries for subsidies to IUU fishing within their Exclusive Economic Zones (EEZs), meaning that no other WTO member can challenge such subsidies for that time period. While this flexibility is welcome it doesn't go far enough and undermines the existing rights that Members have under the United Nations Convention on the Law of the Sea once the time limit expires.

In addition, there is a requirement that upon entry into force each Member shall have legislative and regulatory measures in place to ensure that IUU subsidies are not granted or maintained. This creates uncertainty as it is not covered by the peace-clause and may effectively override it. Such commitments will be difficult as many developing countries have large populations of small-scale fishers undertaking unreported fishing,

often due to a lack of administrative capacity. This poses significant capacity challenges for countries to ensure they remain consistent with the commitments in this article.

Burdensome Obligations Disadvantage Developing Countries

The AFS contains a number of burdensome obligations that Developing Countries will struggle to be able to meet. As mentioned above, the commitments on IUU require significant domestic regulatory and administrative resources that will be a challenge for many countries. The prohibitions on subsidies for overfished stocks, and the flexibility clause for sustainable subsidies, relies on the Member having the capacity and resources to measure and report as well as subsidise their fleets. Both of these articles provide an inherent advantage to the developed countries whom already have the capacity and resourcing to meet these commitments.

Further the transparency and notification requirements under the AFS will place additional burdens on Members who often fail to meet their existing obligations. The commitments in this agreement are extensive and if are tied to flexibilities in future negotiations (as has been proposed previously) will effectively exclude those without capacity from accessing any development flexibilities they are entitled to.

Failure to target overfishing and overcapacity

Under Article 5 there are prohibitions on subsidies provided to fishing or fishing related activities outside the jurisdiction of a coastal state and the competence of a relevant Regional Fisheries Management Organisation/Agreement (RFMO/A). This is sometimes talked about as a success in banning subsidies to high-seas fishing however that isn't strictly the case. This outcome only manages to capture a small percentage of the high seas as the vast majority is under the competence of an RFMO/A, undermining its effectiveness and claims of impact. This limited outcome also highlights the ineffectiveness of the AFS and the failure to meet the mandate set by Leaders under the SDG.

Insufficient Special and Differential Treatment

Under the AFS there has been the creation of a voluntary WTO funding mechanism to support developing countries and least developed countries implement the agreement. The establishment of a

fund with only voluntary contributions creates an imbalance between the extensive commitments being undertaken by developing countries and the capacity support needed to be able to meet them. The existing asymmetries will be further exacerbated as developing countries will be unable to meet the requirements to access flexibilities (if agreed in future negotiations). When the Fund was launched in November 2022, the starting pledges amounted to US\$10million with the aim for US\$20million to be targeted over the course of the fund's operations. This amount is inadequate to meet the extensive needs of the many developing countries in the WTO's membership.

As is mandated under SDG14.6 there is to be "adequate and effective" special and differential treatment. The current commitments and flexibilities contained within the AFS – a 2 year peace-clause, some longer timeframes for notifications, and insufficient technical assistance – fails to meet the mandate set by Leaders.

No Rush to Ratify

Despite the many failings about the outcome, with the Agreement passed at the Ministerial each Member now must decide upon whether or not to ratify. Before Members make such a decision it is important to consider a number of issues as to whether or not ratifying this agreement is in their best interests.

As has been shown above, the AFS contains a number of burdensome obligations for developing countries with inadequate support. The agreement also fails to fulfil the mandate set by Leaders under SDG14.6, despite the comments by the WTO Deputy Director General that it does, which is why further negotiations are being planned. The failure of the outcome to target and hold accountable those most responsible for the historical overfishing of global fish stocks limits the impact that the Agreement will actually have, rendering it of little value.

The AFS itself also contains legal ambiguities that a number of Members had requested be clarified through a process of legal scrubbing. Despite these concerns being raised there has been strong resistance to such a move by the WTO Director General and members like the European Union. Members domestic ratification processes may

highlight these legal ambiguities as a concern for proceeding with ratification. Despite this, there is a belief that the comprehensive negotiations that are meant to follow the AFS will address any of these issues – something that confirms their existence in the agreement.

The acceptance by Switzerland in January 2023 of the AFS now makes a WTO legal scrub even more unlikely however for other Members the issues of ratifying a treaty that contains legal ambiguities remain and must be seriously considered before any decision is made.

Despite this, the ratification and entry into force of the agreement will lower the need for the conclusion of the comprehensive negotiations. If it is acknowledged how politically unlikely it is for the AFS to be terminated as per its sunset clause, there will be little willingness for the big subsidising nations to accept any outcome that will limit their subsidy programs. The watered down outcome of the AFS doesn't hold the big subsidisers accountable yet gives the WTO the publicity of delivering on sustainability. The lack of conclusion of comprehensive negotiations will still see the WTO retain its public framing as having a sustainability agreement while doing little to actually reign in the big subsidisers.

If Members are choosing to proceed with ratifying the AFS then, given the considerable burdens it contains for developing countries, those countries most responsible for the historical overfishing should take the lead on removing their subsidies as per the outcome. This will demonstrate the willingness by those most responsibly to take action to eliminate the prohibited subsidies. Expecting developing countries, least developed countries and small island developing states to ratify before those large industrial fishing nations asks those with the least contribution to the problem to shoulder the burden of the agreement.

Way Forward

The WTO has already started the process to negotiate for a comprehensive outcome on fisheries subsidies. The Ministerial Decision has set up the next Ministerial, currently set for February 2024 in the United Arab Emirates, as the place to receive recommendations for a comprehensive agreement.

This is also coupled by the clause in the AFS that states that if a comprehensive agreement isn't agreed within 4 years of the AFS coming into effect then it will be terminated (unless decided otherwise by the WTO General Council). This sunset-clause on the AFS is aimed to try and secure a comprehensive outcome but as mentioned above can be easily extended or removed, especially given the politically damage that the WTO would experience if one of its agreements were to be dropped.

Conclusions

The outcome from MC12 – the WTO's Agreement on Fisheries Subsidies – has resulted in few gains in terms of addressing IUU fishing subsidies while committing developing countries to significant burdens. This, coupled with the legal ambiguities within the agreement should give countries pause to consider the decision to ratify.

The agreement remains fundamentally flawed and in favour of those countries with large capacity for subsidising and reporting. Its failure to target those most historically responsible for overfishing is ensuring that the burdens of the agreement are being carried by those least responsible. The minimalist SDT only offers a brief peace-clause which fails the mandate of the Sustainable Development Goal. Finally the lack of commitments on technical assistance and capacity building represents a failure to ensure that developing countries and LDCs are able to meet the burdens of this text, instead we will see resources being diverted from elsewhere or an over-reliance on external assistance. This text fails the mandate and it is encouraged to be rejected.

The proposed comprehensive negotiations also provide serious concerns about their ability to target those most responsible while offering heavily conditioned flexibilities for developing countries. On this trajectory they will fail to meet the mandate set by leaders under SDG14.6.

Ahead of MC13 there will be extensive pressure on countries to ratify the AFS and continue to negotiate for a comprehensive outcome. This analysis has highlighted some key areas that will need to be resolved in order to ensure that developing countries, least-developed countries and small island developing states can have a future where they are able to manage their fish stocks and fish their own resources without relying on external fleets.



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