

The voluntary WTO funding mechanism is just one part of technical assistance and capacity building envisaged in Article 7 of the Agreement. Bilateral and multilateral donors have historically provided development finance to the fisheries sectors of developing countries and LDCs. As such, existing and anticipated development finance to fisheries, particularly assistance that supports sustainable fisheries, could have a positive spill-over on the effective implementation of this Agreement. The report finds that total support to the fisheries sector in developing countries and LDCs is significantly less than the estimated USD 22 billion per year in harmful fisheries subsidies worldwide.

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This report summarizes the main elements of the Agreement on Fisheries Subsidies and its implementation from the perspective of developing country and LDC members. The final section of the report maps out development finance to the fisheries sector based on the OECD Development Assistance data. The overall objective of the report is to provide an overview of the existing development finance to the fisheries sector that could be relevant to the implementation of the Agreement.

PART 2 – SUMMARY OF THE AGREEMENT AND WHAT IT MEANS FOR DEVELOPING COUNTRY AND LDC MEMBERS

In many ways the innovative Agreement on Fisheries Subsidies is a first for the WTO, particularly regarding the sustainability approach and obligations in the substantive provisions and the notification and transparency requirements. Another innovation is that each version of the negotiating text leading to the final version of the Agreement was accompanied by an addendum from the Chair of the negotiations, which explained the background and wording of each draft provision to aid the negotiating process.³

Scope

The scope of the Agreement is set out in Article 1 as: subsidies as defined in the Agreement on Subsidies and Countervailing Measures that are specific as also defined in that Agreement, to wild marine capture fishing and fishing related activities taking place at sea. The first two footnotes make clear that the scope does not extend to aquaculture, inland fisheries, or payments under government-to-government access agreements. The third footnote clarifies that the subsidies referred to in the Agreement are to be attributed to the member conferring the subsidy, regardless of where the vessel is registered or the nationality of the recipient of the subsidy.

Subsidy: The meaning of “subsidy” in the Agreement on Fisheries Subsidies is the same as in the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). That definition (Article 1 of the SCM Agreement) provides that a subsidy exists if there is a financial contribution by a government or any public body (including through entrustment or direction of a private body), or there is any form of income or price support, and a benefit is thereby conferred. The term “financial contribution” is defined in broad terms, encompassing direct transfers of funds, such as grants and loans, and potential direct transfers of funds such as guarantees, as well as revenue foregone, and provision of goods or services and purchase of goods, by or on behalf of a government or a public body.

Specificity: Also taken from the SCM Agreement is the concept of specificity of the subsidy. To be covered by the Agreement on Fisheries Subsidies, a subsidy must be specific to an industry or enterprise, or to a group of industries or enterprises, or to a particular region, or be one of the two kinds of subsidies prohibited by the SCM Agreement, which are deemed to be specific.⁴

3 WTO documents TN/RL/W/276/Add.1, 11 May 2021; TN/RL/W/276/Rev.1/Add.1, 30 June 2021; TN/RL/W/276/Rev.2, 8 November 2021; WT/MIN(21)/W/5/Add.1, 24 November 2021; and WT/MIN(22)/W/20/Add.1, 10 June 2022.

4 Under the SCM Agreement, specificity is deemed to exist in respect of the two kinds of subsidies prohibited by that Agreement, namely subsidies contingent upon export performance (export subsidies), and subsidies contingent on the use of domestic over imported goods (import substitution subsidies).

Definitions

Five terms that occur frequently in different parts of the Agreement on Fisheries Subsidies are defined in Article 2: fish, fishing, fishing related activities, vessel, and operator. The definitions of all of these terms, apart from the definition of “operator”, are taken from the Port State Measures Agreement.⁵ Also, the definitions limit the covered activities to those occurring at sea. Onshore activities are excluded.

The main prohibitions



Prohibition on subsidies contributing to IUU fishing

The first substantive discipline is in Article 3 which prohibits subsidies for illegal, unreported and unregulated (IUU) fishing. Once again, the definition of IUU fishing is taken from another international agreement, in this case the International Plan of Action to Prevent, Deter and Eliminate IUU fishing.⁶ Once a final finding or determination has been made against a vessel or operator for IUU fishing or fishing related activities, and subject to the entity that made the determination following certain procedural rules, including notification of the determination to the WTO, the subsidizing member is required to stop any subsidies to the vessel or operator. The entities that can make these findings are the coastal member for areas under its jurisdiction (in nearly all cases this would be the member’s Exclusive Economic Zone, or “EEZ”), the flag State Member for vessels flying its flag, or a Regional Fisheries Management Organization or Arrangement (RFMO/A) for areas and species under its competence.

Article 3.3 includes procedural steps that should be respected by a coastal Member in making an IUU determination, such as basing the determination on relevant factual information; informing the flag State Member and, if known, the subsidizing member; providing an opportunity to exchange information; and notification to the other Member(s) and to the WTO of the final determination. Similarly, Article 3.2 provides that RFMO/As are to follow their own procedures and international law, including through the provision of timely notification and relevant information, in making IUU determinations.

Other parts of Article 3 include an obligation on subsidizing members to take account of the severity of the IUU offence in applying the subsidy prohibition, and a recognition of the importance of port State Members in tackling IUU fishing. Each member also is required to have provisions in place to remove subsidies to vessels and operators found to have engaged in IUU fishing. The final paragraph of Article 3 provides for a 2 year “peace clause” for developing country and LDC members within their EEZs. During this period, such members will be bound by the rules of Article 3 but will be exempt from WTO dispute settlement proceedings under Article 3.

Prohibition on subsidies regarding overfished stocks

The second substantive provision is the prohibition in Article 4 on subsidies for fishing or fishing related activities regarding overfished stocks. Under this Article, responsibility for recognizing that a stock is overfished rests with the coastal state for areas under its jurisdiction, and with an RFMO/A for areas and species under its competence. These responsibilities are consistent with provisions of the United Nations Convention on the Law of the Sea (UNCLOS) and the UN Fish Stocks Agreement (UN FSA).

⁵ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, FAO, 2016.

⁶ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, FAO, 2001.

- Under UNCLOS, a coastal State has
 - full sovereignty over its territorial sea (Article 2);
 - sovereign rights for the management and exploitation of marine resources in its EEZ (Articles 55 and 56); and
 - a duty to cooperate with other states sharing the same fish stock (Articles 63 and 64).
- The UN FSA elaborates on the provisions in UNCLOS on shared stocks and highly migratory stocks by, *inter alia*, providing a legal basis for the establishment of RFMO/As.

Article 4 allows, in certain circumstances, the provision of subsidies to fishing regarding an overfished stock. In particular, such subsidies must be for rebuilding the stock or the subsidizer must have other measures being implemented to rebuild the stock to a biologically sustainable level. Similar to Article 3, the final paragraph of Article 4 provides for a two year “peace clause” for developing country and LDC members within their EEZs. During this period, these members will be bound by the rules of Article 4 but will be exempt from WTO dispute settlement proceedings under Article 4.

Other subsidies

The third substantive provision, in Article 5.1, is a straightforward prohibition on all subsidies to fishing and fishing related activities in areas outside the jurisdiction of coastal members and non-members and outside the competence of a relevant RFMO/A, that is, in the unregulated high seas.

In addition, Article 5 contains two “due restraint” clauses: one for subsidies provided to vessels not flying the subsidizing member’s flag; and the other for subsidies for fishing when the status of the stock is unknown.

The provisions of Article 5 apply equally to all members – developed, developing and LDCs.

Notification and transparency

A key element in the Agreement on Fisheries Subsidies relates to notifications and transparency. Under the SCM Agreement, all members already are required to notify their subsidies by 30 June every two years. Under the Agreement on Fisheries Subsidies, as part of these notifications members will be required to notify the type or kind of fishing activity being subsidized and, to the extent possible, to provide information on stock status, conservation measures, fleets and vessels being subsidized, along with catch data. In respect of the additional information other than on fishing activity, developing country members with a share of the global volume of catch of not more than 0.8%, and LDC members, can provide this information every four years, instead of every two years.

As part of SCM Agreement notifications members will be required to notify the type or kind of fishing activity being subsidized and, to the extent possible, to provide information on stock status, conservation measures, fleets and vessels being subsidized, along with catch data.

In addition, every year each member must provide a list of vessels that it has found to have engaged in IUU fishing.

Other notification requirements relate to measures concerning implementation and administration of the Agreement, as well as descriptions of fishing regimes and participation in RFMO/As.

Other provisions

The Agreement on Fisheries Subsidies contains several other provisions relating to its application, such as Article 9 on institutional arrangements, including the establishment of a Committee on Fisheries Subsidies to oversee implementation through, *inter alia*, the review of notifications. This Article also includes a provision to allow for the evolution of the Agreement through a review that will be conducted five years after entry into force, and every three years thereafter.

The Agreement contains a dispute settlement provision in Article 10, indicating that Articles XXII and XXIII of the General Agreement on Tariffs and Trade (GATT) 1994 as elaborated by the Dispute Settlement Understanding shall apply generally to disputes under the Fisheries Subsidies Agreement, with Article 4 of the SCM Agreement (on prohibited subsidies) applying to disputes arising under Articles 3, 4 and 5 of the Agreement on Fisheries Subsidies.

In addition, Article 11, Final Provisions, provides for several specific issues, including:

- an exemption to allow subsidies for disaster relief;
- a provision ensuring that the Agreement does not have any implications for territorial claims or the delimitation of maritime boundaries, and preventing a panel in a WTO dispute from making findings on any claim that would require it to base its findings on any asserted territorial claims or delimitation of maritime boundaries;
- making it clear that the Agreement does not prejudice existing jurisdiction, rights and obligations of members under international law;
- making it clear that, except as provided otherwise in the Agreement, the Agreement does not 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; and
- that existing rights and obligations under the SCM Agreement are not affected by the Agreement on Fisheries Subsidies.

Termination

The final Article of the Agreement, Article 12, states that if comprehensive disciplines are not adopted within four years of entry into force, the Agreement is terminated unless WTO members decide otherwise. The objective of this clause is to ensure that negotiations on enhanced disciplines – particularly in respect of subsidies contributing to overcapacity and overfishing – are completed within a reasonable time-frame after the Agreement enters into force. This will happen when two-thirds of members have deposited their “instruments of acceptance” with the Director General. The [Annex](#) provides information on how WTO members can deposit their instruments of acceptance.

Special and differential treatment

Appropriate and effective special and differential treatment has been an integral part of the fisheries subsidies negotiations. In addition to the two-year dispute settlement peace clauses for developing country members and LDC members in Articles 3 and 4 (subsidies contributing to IUU fishing and subsidies regarding overfished stocks), Article 6 requires members to exercise due restraint when raising matters involving an LDC member and to take into account that member’s specific situation when exploring solutions. Furthermore, as noted above, developing members with a share of the volume of global fish catch of not more than 0.8%, and LDC members, can provide notifications of most of the required fisheries-related information every four years instead of every two years.

As the above summary makes clear, the Agreement on Fisheries Subsidies is comprehensive and innovative, creating new obligations including in areas that are new for the WTO. Developing country and LDC members may find it particularly challenging to integrate fisheries-related elements into their subsidies policies, to put in place their fisheries information and management systems, and to meet the new notification requirements, particularly on fisheries-related information. For that purpose, Article 7 of the Agreement envisages the creation of a voluntary WTO funding mechanism, to provide targeted technical assistance and capacity building to developing country members, for the purpose of implementing the new disciplines.

What will the WTO Fisheries Funding Mechanism assist with?

