SUBSIDIES CONTRIBUTING TO OVERCAPACITY AND OVERFISHING: THE CHALLENGES IN COMPLETING THE THIRD PILLAR OF THE WTO FISHERIES SUBSIDIES AGREEMENT

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ABSTRACT

The Fisheries Subsidies Agreement (hereinafter "FSA") reached at the 12th Ministerial Conference of the World Trade Organization (WTO) marked a historic achievement in furthering agenda 14.6 of the United Nations Sustainable Development Goals (UNSDGs). The text of the FSA prohibits subsidies for the following fishing or fishing related activities: subsidies for illegal, unreported or unregulated (IUU) fishing, fishing targeting overfished stocks, and; fishing in the unregulated high seas. However, the FSA as it stands today is not a comprehensive agreement in itself. Article 12 of the FSA mandates the adoption of comprehensive disciplines within four years of entry into force of the Agreement failing which the Agreement could terminate. While the additional pillar under the FSA seeks to discipline subsidies that can lead to overcapacity and/or overfishing (hereinafter "OCOF") and thereby encourages sustainable fishing, disciplines on this pillar can potentially curtail the ability of countries that are still not part of the Regional Fisheries Management Organisations/Arrangements (RFMOs/As)

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and countries not involved in Distant Water Fishing (DWF) to realize their fishing capabilities. In addition, developments on OCOF can also have implications on the income and livelihood security of fishermen in several developing and least developed countries. Given these sensitivities, the article examines how the third pillar on OCOF can achieve ocean sustainability, and importantly sustainable fisheries, while not impairing the ability of the people who depend on the oceans for their livelihood and income security.

KEYWORDS: *WTO Fisheries Subsidies Agreement, overcapacity and overfishing, IUU, distant water fishing, special and differential treatment*

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I. INTRODUCTION

The concept of protection and the preservation of the environment has been embedded in the preamble of the Marrakesh Agreement establishing the World Trade Organization (hereinafter "WTO") which acknowledges the concept of sustainable development as a significant part of the trade and economic framework. The preamble emphasises the need to allow for "the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment"[1] as one of the objectives of the WTO. It further provides for the accomplishment of such an objective "in a manner consistent with the Members' respective needs and concerns at different levels of economic development." [2] The WTO Director-General and Trade Negotiation Committee Chairperson Ngozi Okonjo-Iweala has repeatedly highlighted the importance of addressing the concerns regarding fisheries resources in order to fulfil a common objective for the health of the planet and the livelihood of the people in line with the principles of the Marrakesh Agreement.[3]

Why should the WTO negotiate an otherwise environmental agreement? The WTO has a mandate to discuss the topic of fisheries conservation only because there is a reference to "harmful subsidies" which is indeed a trade discipline.[4] In other words, the efforts to develop disciplines on subsidies provide a narrow and limited gateway for the WTO to serve as a forum to discuss critical issues relating to fisheries management and conservation. In many ways, international bodies such as the Food and Agriculture Organisation (hereinafter "FAO") and the Regional Fisheries Management

[1] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.
[2] *Id.*
[3] Trade Negotiation Committee, *Minutes of Meeting*, at 3, WTO Doc. TN/C/M/41 (July 30, 2021).
[4] THE WTO AGREEMENT ON FISHERIES SUBSIDIES: WHAT IT DOES AND WHAT COMES NEXT, WORLD TRADE ORGANIZATION [hereinafter WTO] (2022).

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Organisations/Arrangements (hereinafter "RFMOs/As") are far more appropriate organizations to discuss the subject matter; however, they lack some of the most critical enforcing abilities, especially the ability to deter the grant of subsidies. Considering the limited gateway available to the WTO in fisheries conservation, it is important to look at this Agreement as a mechanism of balancing trade interests and sustainability objectives.

The discussions on addressing fisheries subsidies through an international agreement is not anything new. There have been continuous discussions on this topic since the publication of a FAO Report[5] in 1992 which highlighted the scale of subsidies in the fisheries sector and the positive impact of prohibition of such subsidies on the management of fish stocks. Within the framework of the FAO Code of Conduct for Responsible Fisheries, 1995, the International Plan of Action for the Management of Fishing Capacity highlighted the problem of excessive fishing capacity and its significant contribution to overfishing.[6] In 1998, a technical report by the World Bank stated that the subsidies being provided to manage fisheries are in themselves becoming a cause of the undermining of their management.[7]

In the above context, Part I of the article traces the history and background of fisheries subsidies negotiations at the WTO. Part II of the article examines how disciplines on subsidies contributing to overcapacity and/or overfishing (hereinafter "OCOF") remained an unfinished agenda of 12th Ministerial Conference (hereinafter "MC 12") and how further progress could be made in the 13th Ministerial Conference (hereinafter "MC 13") and beyond. In particular, Part II focuses on the role and mandate of the RFMOs/As, the issues related to various approaches in curbing subsidies that contribute to OCOF (for example, the effects-based and list-based approaches), and the role of special and differential treatment in ensuring a fair outcome. The article, among other issues, discusses the need to discipline subsidies that enable distant water fishing in connection with the negotiations on the OCOF pillar. Part III concludes with a summary of the observations and findings.

[5] Food and Agriculture Organization of the United Nations [hereinafter FAO], *Marine Fisheries and the Law of the Sea: A Decade of Change: Special Chapter (Revised) of the State of Food and Agriculture 1992*, 853 FAO FISHERIES CIRCULAR 1 (1993).

[6] *International Plan of Action for the Management of Fishing Capacity*, FAO, https://www.fao.org/3/X3170E/x3170e04.htm (last visited Dec. 21, 2023).

[7] Matteo Milazzo, *Subsidies in World Fisheries: A Reexamination* vii (World Bank's Fisheries Series, Technical Paper No. 406, 1998).

II. TRACING THE ORIGIN OF FISHERIES SUBSIDIES AGREEMENT

There is evidence that the share of fish stocks within biologically sustainable levels are quickly depleting.[8] This significant decrease has caused an alarming situation with the international community and relevant stakeholders urging substantial efforts for the maintenance of sustainable fisheries. There has been an increasing trend in the percentage of stocks fished at biologically unsustainable levels from 10% in 1974 to 35.4% in 2019.[9] This increasing trend represents a serious adverse impact on the biodiversity of the oceans as well as the harmful effects of undesirable fishing activities.

To put it in context, after the establishment of the WTO in 1995, the Committee on Trade and Environment (hereinafter "CTE"), discussed the potential impacts of the fisheries subsidies. In these discussions, the Members expressed differing views with respect to fisheries subsidies and their impact on OCOF. In the meeting held in CTE on April 9, 1998, Japan was of the view that the main cause of overexploitation was the lack of sustainable fisheries management and a reduction in subsidies would not always lead to sustainable fisheries.[10] New Zealand further stated that overcapacity constituted a large part of the problem. New Zealand was concerned about the effects of subsidization for fishing and its impact on trade. It was concerned that the inflated returns led to excess capacity and overfishing particularly in poorly managed fisheries.[11] Norway's intervention highlighted the importance of resource management policies as an essential part of fisheries management and the need to identify the forms of subsidies provided and their negative effects.[12] The European Communities noted that subsidies were not inherently good or bad for fish stocks and that there was a need to differentiate the subsidies according to their impact on trade distortion.[13] In essence, the role of subsidies in sustainable fisheries management was one of the highlights of the CTE discussions.

While the link between subsidies and unsustainable fishing attracted wide-ranging attention, *The Sunken Billions Revisited*, a report by the World bank in 2018, made a revealing finding that a significant reduction in the global fishing overcapacity could lead to benefits such as an increase in biomass by a factor of 2.7, an increase in annual harvests by 13%, and a

[8] FAO, THE STATE OF WORLD FISHERIES AND AQUACULTURE 2022: TOWARDS BLUE TRANSFORMATION 181 (2022).
[9] *Id*. at 46.
[10] Committee on Trade and Environment, *Report of the Meeting Held on 19-20 March, 1998*, at 13, WTO Doc. WT/CTE/M/17 (Apr. 9, 1998).
[11] *Id.*
[12] *Id.* at 14.
[13] *Id.* at 15.

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thirtyfold increase in annual net benefits accrued to the fisheries sector.[14] Overfishing is not solely dependent on subsidies and can occur independently; however, subsidies play a crucial role in aggravating overcapacity, which can lead to overfishing. Overfishing can have major impacts on the ecosystem,[15] including the altering of marine ecosystems, especially in biodiversity and ocean health.[16]

It is reported that bulk of the global fish capture is constituted by large-scale fishing.[17] Small-scale fisheries account for at least 40% of global fish catch and support the livelihood of nearly 500 million people.[18] The literature suggests that the socio-economic impact of large scale fishing is lower, less sustainable in terms of environmental parameters such as CO_2 emissions, fuel consumption, discards, by-catch or destruction of marine habitats.[19]

At the WTO, the mandated discussions on fisheries subsidies began in 2001 as part of the Doha Round of Negotiations.[20] At the fourth Ministerial Conference (MC 4) held in Doha, there was a formal launch of negotiations on fisheries subsidies. The mandate included further work on disciplining fisheries subsidies in order to clarify and improve the disciplines. The initial discussion on fisheries subsidies was in the context of the existing trade agreements with the objective of incorporating this agreement within the existing framework. The mandate of Doha was further refined in 2005 at the Hong Kong Ministerial Conference (hereinafter "MC 6") which required Members to strengthen the disciplines on subsidies in the fisheries sector, including the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing.[21] The outcome document in MC 6 also called on the Members to promptly undertake further detailed work to, inter alia, determine the nature and extent of those disciplines, including transparency and enforceability.[22] It also highlighted the importance of appropriate and effective special and differential treatment (hereinafter "S&DT") in order to meet the development priorities of developing and least-developed Members in relation to food security, livelihood security and

[14] *See generally* WORLD BANK, THE SUNKEN BILLIONS REVISITED (2009).
[15] *See generally* Marta Coll et al., *Ecosystem Overfishing in the Ocean*, 3(12) PLOS ONE 1 (2008).
[16] *See generally* Benjamin S. Halpern et al., *An Index to Assess the Health and Benefits of the Global Ocean*, 488 NATURE 615 (2012).
[17] Peter Lunenborg, *Analysis of the Overcapacity and Overfishing Pillar of the WTO Fisheries Subsidies Negotiations*, S. CTR. 1, 5 (2020), https://www.econstor.eu/bitstream/10419/232248/1/south-centre-rp-122.pdf.
[18] FAO ET AL., ILLUMINATING HIDDEN HARVESTS: THE CONTRIBUTIONS OF SMALL-SCALE FISHERIES TO SUSTAINABLE DEVELOPMENT 71 (2023).
[19] Lunenborg, *supra* note 17, at 22.
[20] WTO, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).
[21] WTO, Ministerial Declaration of 18 December 2005, WTO Doc. WT/MIN(05)/DEC, Annexures, Annex D ¶ 9 (2005).
[22] *Id.*

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poverty alleviation. This mandate drastically shifted the focus to the identification of the types of subsidies to be included under the prohibitions. The negotiating group submitted a draft Chair Text on Rules[23] in 2007, prescribing a list of prohibited subsidies such as subsidies for construction or acquisition of fishing vessels, operating cost of fishing vessels, and income support. The text also provided for S&DT with a full exemption to the Least Developed Countries (hereinafter "LDCs") and conditional exemption for other developing countries.

Despite the significant efforts in the identification and integration of fisheries subsidies as a part of the negotiations on subsidies and countervailing measures, little progress was made in the formulation of disciplines for the regulation of fisheries subsidies. The Bali Ministerial Conference in 2013 (MC 9)[24] further provided an impetus by establishing a new work program that sought to examine the issues remaining unaddressed from the Doha Round. The negotiations that were stalled in 2011 again gained momentum in 2015 as the United Nations (hereinafter "UN") Members adopted the 17 United Nations Sustainable Development Goals (hereinafter "UNSDGs") at the UN Sustainable Development Summit.[25]

The adoption of UNSDGs offered a new impetus to conclude an agreement on fisheries subsidies that has clear linkages with environmental objectives within the framework of the WTO. SDG 14 (Life Below Water)[26] provided the requisite importance to the conservation and sustainable use of the oceans and marine resources for achieving sustainable development. It encompasses ten indicators which have set targets for measurement. Target 14.6 provided a clear mandate to the UN Members by stating:

> [B]y 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and, refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.[27]

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[23] WTO, Draft Consolidated Chair Texts of the AD and SCM Agreements, WTO Doc. TN/RL/W/213 (2007).
[24] WTO, Ministerial Declaration of 11 December 2013, WTO Doc. WT/MIN(13)/DEC (2013).
[25] G.A. Res. 70/1. (Oct. 21, 2015).
[26] *Goals 14: Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development*, UNITED NATIONS [hereinafter U.N.], https://sdgs.un.org/goals/goal14 (last visited Dec. 21, 2023).
[27] *Id*.

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The importance of ocean sustainability and the specific reference to the WTO fisheries negotiations in Goal 14.6 led to a renewed interest and a new direction in the FSA negotiations since the adoption of the UNSDGs.

In the meantime, the WTO negotiations meandered without reaching a deal, and the 2020 deadline of the UNSDG was not realized. The WTO Chairs Text of November 2021 (W5)[28] comprised disciplines under OCOF. The Members intended to include OCOF in the run up to the MC12 and there were serious discussions on the same issues. However, realising the complexities of the issues such as list-based prohibitions, S&DT for developing countries, and the sensitive issue of non-specific fuel subsidies, the Members agreed to negotiate these outstanding issues at a later stage. Finally, there was a Ministerial Decision on FSA at MC 12 in June 2022 without disciplines on OCOF. There were concerns at that time that some provisions of the Draft Text on OCOF could adversely affect small scale and artisanal fisherfolk of the developing and least developed Members. Article 5.1.1 of the Draft Text also provided a carve-out for Members to provide subsidies to maintain stocks in the relevant fishery or fisheries at a biologically sustainable level. The negotiating group intended to preserve the momentum and resume negotiations on OCOF to reach a conclusion by MC 13. The negotiating Group on Rules has been conducting monthly fish weeks for deliberation and discussions in order to conclude the third pillar on OCOF.

Overall, the FSA adopted at MC 12 marks a historic achievement for the membership, in prohibiting harmful fisheries subsidies and promoting management and conservation for enhancing sustainability of fish stocks. Albeit a slimmed-down agreement, the FSA can be considered as ground breaking as it has managed to achieve a global agreement on difficult and intractable issues with a targeted approach towards sustainability of fisheries.[29] The FSA steers the fisheries subsidies reforms in a rules based direction with the incorporation of sustainability and transparency benchmarks.[30] The text of the FSA places a prohibition on subsidies related to fishing or fishing related activities for the following:

1. Article 3: Subsidies contributing to illegal, unreported or unregulated (IUU) fishing,
2. Article 4: Subsidies regarding overfished stocks, and
3. Article 5: Other Subsidies—fisheries in the "unregulated" high seas.

[28] For the text, see WTO, Ministerial Conference of 30 November-3 Decemeber 2021, WTO Doc. WT/MIN(21)/W/5 (2021) (The W/5 text was released just in time before the MC 12 meeting originally scheduled in Geneva in November 2021. The MC 12 was postponed to June 12-16, 2022 in view of the detection of the omicron variant of Covid-19.)

[29] Juan He, *A Jurisdictional Assessment of International Fisheries Subsidies Disciplines to Combat Illegal, Unreported and Unregulated Fishing*, 14 SUSTAINABILITY 1, 2 (2022).

[30] *Id.* at 1.

Importantly, the FSA seeks to provide a strong instrument to deter IUU fishing based on affirmative determination. Moreover, it seeks to provide a mechanism to put in place strong protections for fishing on overfished stocks with an exemption for rebuilding the stock to a biologically sustainable level. Overfishing occurs when the rate of fishing is so high that the stock cannot be replenished naturally. A fish stock is considered to be overfished when it has been exploited beyond a point that it cannot be maintained at a biologically sustainable level (hereinafter "BSL") through natural reproduction. Considering the severity of the issue, Article 4 of the FSA lays down strict provisions to prohibit subsidies regarding overfished stocks. It provides that a fish stock shall be considered overfished if it is recognised 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 . However, it provides some flexibility to grant subsidies if such subsidies are granted to rebuild the stock to a biologically sustainable level.

The situation of an overfished stock can be considered as an area of definite concern, requiring stricter measures to protect the exploited stock from becoming endangered. OCOF, if not regulated, can accentuate the risk of overfished stocks. Although there is an overlap, the regulation of both overcapacity and overfishing is essential in order to maintain the fish stocks at a biologically sustainable level.

Importantly, Article 5.1 of the FSA prohibits subsidies to fishing or fishing-related activities outside the jurisdiction of a Coastal Member or Coastal non-Member and outside the competence of a relevant RFMO/A. Stated in simple terms, the FSA prohibits subsidies to fishing activities outside the jurisdiction of exclusive economic zones (hereinafter "EEZ") of Members (i.e., beyond 200 nautical miles of their coast) or outside the competence of an RFMO. In addition, the Members have agreed on the specific provisions for LDC Members (Article 6), technical assistance and capacity building (Article 7), notification and transparency (Article 8), institutional arrangements (Article 9), dispute settlement (Article 10) and final provisions (Article 11).

Article 12 of the Agreement provides for termination of the Agreement, if comprehensive disciplines are not adopted within the defined period. Furthermore, Paragraph 4 of the Ministerial Decision of the FSA highlights the importance of adoption of comprehensive disciplines. In the above context, Members have earnestly begun the process of depositing their instrument of acceptance for the adoption of this Agreement. At present, forty-four Members (counting the European Union (hereinafter "EU") as one) have submitted their instrument of acceptance. The most recent acceptances have been received from Members such as Norway, Chad,

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Malaysia, Rwanda, Saudi Arabia, Togo, Türkiye, Brunei Darussalam and Philippines.[31]

III. UNFINISHED AGENDA OF MC 12—OVERCAPACITY AND OVERFISHING

Negotiations on a residual category of OCOF subsidies with other outstanding issues such as non-specific fuel subsidies and government-to-government payments have taken place in the run up to MC 13 scheduled in Abu Dhabi in February 2024. In addition, disciplines on OCOF are considered to be part of the FSA and there was a promise to get back to the contentious issues in due course.[32] Paragraph 4 of the Ministerial Decision on FSA states:

> Notwithstanding Article 9.4 of the Agreement on Fisheries Subsidies, the Negotiating Group on Rules shall continue negotiations based on the outstanding issues in documents WT/MIN(21)/W/5 and WT/MIN(22)/W/20 with a view to making recommendations to the Thirteenth WTO Ministerial Conference for 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, recognizing that appropriate and effective special and differential treatment for developing country Members and least developed country Members should be an integral part of these negotiations.[33]

The following discussions examine the complex matrix of issues pertinent to the OCOF discussions.

A. OCOF and the Role of Regional Fisheries Management Organisations/Arrangements (RFMOs/As)

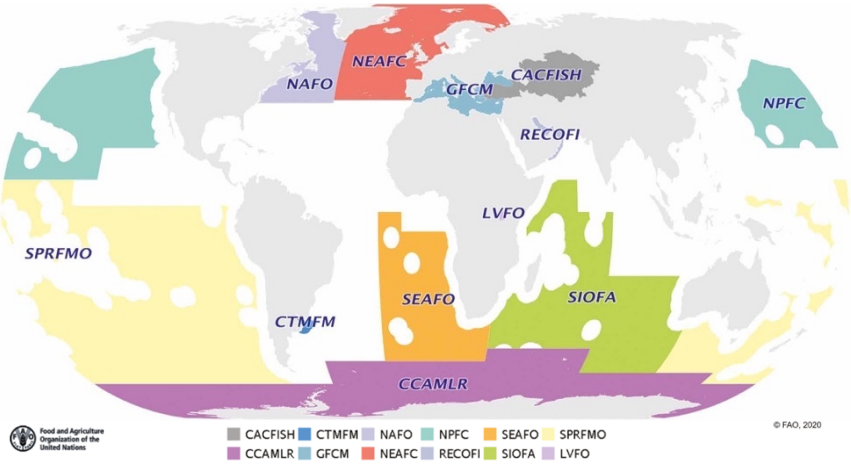
Regional Fisheries Management Organisations/Arrangements are the building blocks of fisheries management. RFMOs/As are treaty-based intergovernmental bodies that are concerned with the conservation and

[31] *Members submitting acceptance of Agreement on Fisheries Subsidies*, WTO, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_acceptances_e.htm (last visited Dec. 22, 2023).
[32] Mitchel Lennan & Stepahnie Switzer, *Agreement on Fisheries Subsidies*, 38(1) INT'L J. MARINE & COASTAL L. 161, 176 (2023).
[33] WTO, Ministerial Decision of 17 June 2022, WTO Doc. WT/MIN(22)/33, WT/L/1144 (2022).

management of shared fish stocks and other marine resources.[34] According to the FAO, at present, there are fifty-three Regional Fisheries Bodies (hereinafter "RFBs").[35] Out of these, twenty-three are RFMOs. In other words, only RFBs having a management mandate are called RFMOs. RFMOs themselves can be divided into RFMOs focusing on the management of highly migratory or straddling species such as tuna or tuna-like species, for example, the Indian Ocean Tuna Commission (IOTC) or Inter-American Tropical Tuna Commission (IATTC), and RFMOs managing other fisheries resources such as pelagic and demersal resources (see Figure 1 and 2).[36] The RFMOs adopt fisheries conservation and management measures that are binding to their Members. The twenty-three RFMOs are classified into generic and species-specific RFMOs, out of which thirteen are generic and ten are species specific.[37] According to a study, only 1.35% of the high seas or 0.8% of the oceans are not covered by national EEZs or by RFMOs of some type.[38] Most of the fisheries are governed by at least one RFMO.

[34] *International and Regional Fisheries Management Organisations*, NOAA FISHING, https://www.fisheries.noaa.gov/international-affairs/international-and-regional-fisheries-management-organizations (last visited Dec. 26, 2023).
[35] Regional Fishery Bodies [hereinafter RFB], https://www.fao.org/fishery/en/organization/search (last visited Dec. 24, 2023).
[36] REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS OF EUROPEAN COMMISSION [hereinafter RFMOs], https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/regional-fisheries-management-organisations-rfmos_en (last visited Dec. 26, 2023).
[37] RFB, *supra* note 35.
[38] Justin Alger et al., *What Would Article 5.1 of the 2022 WTO Ministerial Agreement on Fisheries Subsidies Accomplish?*, 153(105641) MARINE POL'Y 1, 2 (2023).

FIGURE 1: FAO/Statistics on Generic RFMOs/As Responsible for Conservation and Management of Living Marine Resources or Fishery Resources in Their Area of Competence



Source: FAO Stats[39]

It is important to recall that the 1995 United Nations Fish Stocks Agreement (hereinafter "UNFSA")[40] entered into force in 2001 with the objective of long-term conservation and sustainable use of the fish stocks and migratory species. To meet this objective, the UNFSA seeks to effectively implement the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS). The UNFSA is the foundation of the legal regime for the regional cooperation through RFMOs. The RFMOs/As enjoy a supranational level of fisheries jurisdiction. Their jurisdiction and competence are dependent on the needs and expectations of the flag states operating in the covered regions, and also their mandate in relation to migratory species that typically traverse into their adjacent EEZs or high seas.[41] Article 8 of the UNFSA provides that in areas where there is a competent RFMO, the states should either become a member or agree to apply the conservation and management measures set by the RFMOs.[42] RFMOs can apply a variety of measures and management tools including the use of fisheries quotas, technical measures, spatial and/or temporal

[39] Terje Løbach et al., *Regional Fisheries Management Organizations and Advisory Bodies Activities and Developments, 2000–2017*, FAO 1, 10 (2020), https://www.fao.org/3/ca7843en/CA7 843EN.pdf.
[40] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 4, 1995-Dec. 4, 1996, 2167 U.N.T.S. 3.
[41] He, *supra* note 29, at 4.
[42] THE INTERNATIONAL INSTRUMENTS: EVOLVING ROLE OF RFMOS AND PROVISIONS RELATED TO IUU FISHING, https://www.fao.org/3/a0098e/a0098e04.htm (last visited Dec. 24, 2023).

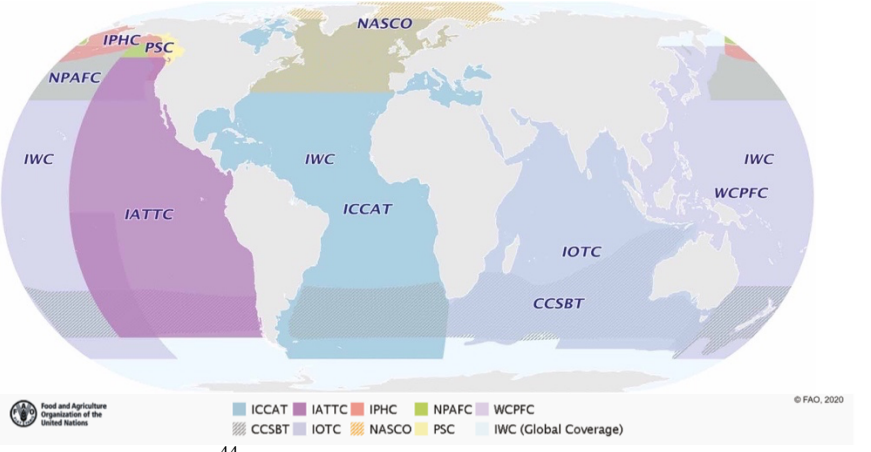
restrictions, monitoring, control and surveillance activities, and regular review of compliance. However, there is uncertainty whether certain prevailing issues such as determination of the excess capacity of fishing fleets, allocation of high seas, and measurement and ecosystem based management for their decision making process can fall within the remit of an RFMO or not.

The RFMOs/As form a central pillar of the WTO FSA. Article 3 of the FSA provides that the coastal Member, flag state Member or relevant RFMO/A, shall make an affirmative determination whether a vessel or operator is engaged in IUU fishing or not. It also provides that a determination made by the RFMO/A shall be in accordance with its own rules and procedures and the relevant international law in areas and species falling under its competence and must be made through timely notification. Similarly, Article 4 of the FSA provides that a fish stock is recognised as overfished by the coastal Member having jurisdiction or the relevant RFMO/A in areas and for species under its competence, based on the best scientific evidence available. Furthermore, in relation to disciplining subsidies in the unregulated high seas, Article 5 of the FSA provides that a WTO Member shall not grant or maintain subsidies to fishing or fishing related activities taking place outside the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant RFMO/A.[43]

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[43] WTO, *supra* note 33, at 5.

FIGURE 2: List of Species-Specific RFMOs, Responsible for the Conservation of a Particular Stock or Species, e.g., Tuna.



Source: FAO Stats[44]

B. Challenges in Disciplining Subsidies Under OCOF-Specific Issues for Pillar III

With the negotiations taking place in full-swing during 2022-2023 to conclude the OCOF pillar by MC 13, the debates and deliberations around the topic have intensified. There are major challenges as the scale of development of fishing capacity differs widely for developed, developing and least developed countries. Another important aspect to be considered is the original mandate of the FSA and the need for balancing the role of fisheries in supporting people's livelihood and food security in several WTO Members.

Importantly, the disciplines on OCOF must work in conjunction with the other disciplines such as the disciplines on *IUU Fishing* and *Overfished Stock* and must eventually be incorporated into the larger scheme of the FSA. On the one hand, the subsidies leading to excess capacity can lead to stress on the limited marine resources, the overall marine ecosystem, and the concomitant distortion to trade. On the other, any such disciplines on subsidies should not undermine the ability of the fishing population, especially in developing and low-income economies to meet their livelihood and sustenance concerns. Overcapacity tends to occur whether it is accompanied by subsidies or not, in case of an open-access or common-pool

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[44] Løbach et al., *supra* note 39, at 10.

fishery.[45] According to various investigators, evidence from a range of sources demonstrate that the national fishing fleets of major fishing countries already suffer from overcapacity that is more than twice the level necessary for a sustainable level of catch.[46]

Despite the sensitive nature of the topic, the WTO Members have proposed multiple approaches to address subsidies contributing to OCOF. In addition, the nature and scope of S&DT continue to be contentious. The following section seeks to analyse four significant challenges associated with the disciplining of subsidies under OCOF, namely:

1. List-Based Approach
2. Effects-Based Approach
3. Special and Differential Treatment
4. Distant Water Fishing

1. List-Based Approach — A list-based approach for disciplining subsidies leading to OCOF, seeks to prohibit Members from providing subsidies included under the list, irrespective of the impact of such subsidies on OCOF. The subsidies that were identified to be prohibited under the W/20 text were:

(a) subsidies to construction, acquisition, modernisation, renovation or upgrading of vessels;

(b) subsidies to the purchase of machines and equipment for vessels (including fishing gear and engine, fish-processing machinery, fish-finding technology, refrigerators, or machinery for sorting or cleaning fish);

(c) subsidies to the purchase/costs of fuel, ice, or bait;

(d) subsidies to costs of personnel, social charges, or insurance;

(e) income support of vessels or operators or the workers they employ;

(f) price support of fish caught;

(g) subsidies to at-sea support;

(h) subsidies covering operating losses of vessels or fishing or fishing related activities.[47]

The list-based approach consists of listing prohibited subsidies based on an ex ante acknowledgement that these forms of support contribute to excessive fishing effort and capacity.[48] In other words, subsidies for fishing which reduce capital or operational costs need to be curtailed. The list-based approach operates with an underlying presumption that the listed subsidies always lead to overcapacity and overfishing. However, in certain cases, it is

[45] GARETH PORTER, FISHERIES SUBSIDIES AND OVERFISHING: TOWARDS A STRUCTURED DISCUSSION 9 (2002).
[46] *Id.* at 8.
[47] WTO, *Agreement on Fisheries subsidies, Draft text*, at 4, WTO Doc. WT/MIN(22)/W/20 (June 10, 2022).
[48] Alice Tipping & Tristan Irschlinger, *WTO Negotiations on Fisheries Subsidies: What's the State of Play?*, INT'L INST. FOR SUSTAINABLE DEV. [hereinafter IISD] 1, 12 (2020), https://www.iisd.org/system/files/2020-08/wto-negotiations-fisheries-state-play_0.pdf.

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absolutely plausible that all such subsidies may not lead to overcapacity, particularly when a Member does not have capacity to begin with. This is especially relevant for developing countries and LDCs. In these situations, classifying such subsidies under a prohibited list may deter the growth of fishing capacity in several countries where the capacity is minimal or non-existent.

A close-ended list would also imply that prohibition does not extend to subsidies that are not provided under the list. However, negotiations have led to a strong debate whether the list would be exhaustive or indicative.[49] Many developing Members and LDCs have questioned the list based approach as a whole or certain specific subsidies prohibited under the list. An example is income support. Some Members have suggested that the proposed list shall merely be indicative consisting of the commonly provided subsidies. China welcomed the hybrid approach which is a combination of the effects-based approach and a list of prohibited subsidies, which in addition provides for the exemption for subsidies that qualify the condition under the sustainability carve-out for maintaining stocks in the relevant fishery/fisheries at a biologically sustainability level.[50] The African Group proposed an additional item in the list namely "subsidies contingent on re-investment in fishing or fishing related activities".[51] Several Members have reiterated that the list is illustrative or indicative and have also cautioned against the removal of items as it may have unintended implications.[52] This raises a question on the purpose of the list itself.

A study[53] conducted in 2019 classified the fisheries subsidies into three categories: capacity enhancing, beneficial, and ambiguous. Beneficial subsidies are considered to be those that are in the form of investments to promote the conservation and management of fisheries. The capacity-enhancing subsidies are considered as those that increase the capacity, such as investments in vessels and port infrastructure, fees to access a third country waters, and fuel subsidies.[54] Ambiguous subsidies can fall in either of the above two categories depending upon its design and implementation.

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[49] Peter Ungphakorn, *Technical Note: the Meaning of 'Fisheries Subsidies' for the WTO Talks*, TRADE B BLOG (Oct. 6, 2023), https://tradebetablog.wordpress.com/tech-note-meaning-fisheries-subsidies/.

[50] D. Ravi Kanth, *WTO: China Proposes OCOF Subsidy Disciplines Framework in Fisheries Talks*, THIRD WORLD NETWORK (June 7, 2023), https://www.twn.my/title2/wto.info/2023/ti230605.htm (last visited Dec. 24, 2023).

[51] D. Ravi Kanth, *WTO: South Countries Face Crucial Test in Safeguarding S&DT in Fisheries Talks*, THIRD WORLD NETWORK (Dec. 5, 2023), https://www.twn.my/title2/wto.info/2023/ti231 202.htm.

[52] Peter Ungphakorn, *What's Left to Resolve in WTO Fisheries Subsidies Talks After Deadline Missed*, TRADE B BLOG (Dec. 12, 2023), https://tradebetablog.wordpress.com/2023/12/12/whats-left-to-resolve-in-wto-fisheries-subsidies-talks-after-deadline-missed/.

[53] U. Rashid Sumaila et al., *Updated Estimates and Analysis of Global Fisheries Subsidies*, 109(103695) MARINE POL'Y 1, 1-2 (2019).

[54] *Id.* at 10.

The impact of the ambiguous subsidies depend on fisheries that are being targeted and the method of implementation of the various support programs. Subsidies falling under this category may include interventions such as assistance to fishermen during off-season, income support programmes and vessel buyback programmes.[55] Given the fact that Members use different types and categories of subsidies in order to support their fisheries sector, it is almost challenging to have an open-ended list that could cater to the interests and concerns of a diverse membership.

2. Effects-Based Approach — The underlying feature of an effects-based approach is derived from a relationship of cause and effect. This approach is not based on a pre-determined set of subsidies as provided under the list-based approach. The concept is based on the understanding that the prohibition must apply only when a determination is made that a subsidy has a negative impact on the fish stock and is leading to OCOF. The discussion on the effects based approach can be traced to the Incubator Group Discussions in 2018 [56] in which the delegates discussed the different approaches of the discipline, viz., list-based, effects-based or hybrid approaches. The effect-based approach is also derived from the idea of actionable subsidies provided under the Agreement on Subsidies and Countervailing Measures (hereinafter "ASCM") which involves application of a prohibition only when the subsidies are *in fact* contributing adversely or negatively to the stated concern.[57] To explain, in the context of the ASCM, the concern is trade related concern, whereas in the context of the FSA, the concern would be related to the sustainability of fisheries.

The idea of measurement of a negative impact or an actual impact of the subsidy is a crucial element in the effect-based analysis. There is a need for more clarity on a criteria for assessment that can be applicable for all Members. In many ways, estimating the "adverse effects" similar to what is done in the context of the ASCM would require significant amount of evidence and data on the detrimental impact of the subsidies. In addition, the estimation of cause and effect, by its very nature, is contestable. To explain, whether certain subsidies can lead to overcapacity or overfishing will depend on a host of factors including the type and nature of fisheries, the size and frequency of payments, the number of recipients of the concerned subsidy, etc. In addition, the approach adopted in the IUU pillar as well as the overfished pillar of the FSA is not necessarily an effects-based approach. To be specific, Article 3 of the FSA provides for affirmative determination of a

[55] Daniel J Skerritt et al., *A 20-Year Retrospective on the Provision of Fisheries Subsidies in the European Union*, 77(7-8) ICES J. MARINE SCI. 2741, 2743(2020).
[56] WTO, *Negotiating Group on Rules, Fisheries Subsidies Work Programme, September-December 2018, Communication from the Chair, Revision*, at 7, 15, WTO Doc. TN/RL/30/Rev.1 (Oct. 3, 2018).
[57] Agreement on Subsidies and Countervailing Measures art. 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1869 U.N.T.S. 14.

vessel or operator engaged in IUU fishing. Similarly, Article 4 of the FSA on overfished stocks provides a mechanism for determination by stating "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."[58] The Chair in its proposal of December 21, 2023, has provided that before a Member grants a subsidy, it shall consider the consequence of the subsidy on overcapacity and overfishing.[59] This provision clearly places a burden on the granting Member regarding the potential effects of the subsidy.

The Chair's proposal of December 21, 2023[60] has also clarified that the core disciplines for OCOF will be continuously based on the hybrid approach combining a list of presumptively prohibited fisheries subsidies, with a qualification to the prohibition based on sustainability elements. The approach proposed in this text provides a sustainability carve-out to the Members in order to provide them with a flexibility to provide the subsidies prohibited in the list provided they fulfil the requirement of demonstration as stated in this article. Such an exemption is available, when the Member demonstrates that the measures are implemented to ensure that the stock or stocks in the relevant fishery or fisheries are maintained at a biologically sustainable level. This takes into account the sustainability factor while granting or maintaining subsidies. This approach seeks to classify Members into two tiers based on the annual aggregate value of fisheries subsidies, i.e. the twenty largest providers of fisheries subsidies would be classified as Tier One and the remaining Members would be classified as Tier Two. Through this classification the text seeks to place stricter obligations on Tier One Members.

3. Special and Differential Treatment — Almost all WTO covered agreements incorporate certain type of S&DT and the FSA cannot be any different. The S&DT can be in terms of either the substantive nature of the obligations or the time required for implementing the obligations. The objective of these provisions is to provide the necessary flexibility and policy space for the developing Members and LDCs to develop and effectively utilize their marine/fisheries sector.

The S&DT provisions under the WTO covered agreements broadly include the following[61]:

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[58] WTO, *supra* note 33, at 5.

[59] WTO, *Fisheries Subsidies, Draft Consolidated Chair Text, Draft Disciplines on Subsidies Contributing to Overcapacity and Overfishing, and Related Elements*, at 2, WTO Doc. TN/RL/W/277 (Dec. 21, 2023).

[60] *Id.* at 2-3.

[61] S*pecial and Differential Treatment Provisions*, WTO, https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm.

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(a) Longer and extended time periods for implementing Agreements and commitments, for example, longer grace period for introducing product patents, phasing out trade-related investment measures, etc.;

(b) Higher threshold for certain covered agreements to apply; for example, Annex VII Members under the ASCM are entitled to maintain export subsidies until they graduate;

(c) Schemes or measures to increase trading opportunities for developing countries, for example, the Generalized System of Preferences and the Enabling Clause;

(d) Provisions requiring all WTO Members to safeguard the trade interests of developing countries, in the nature of technical cooperation for implementing the obligations under the Agreement. For example, Article 67 of Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides for technical cooperation for developing country Members to facilitate the implementation of the Agreement;

(e) Support to help developing countries build the capacity to carry out WTO work, handle disputes, and implement technical standards. For example, Article 7 of the FSA provides for technical assistance and capacity building for the developing and LDC Members; and

(f) Provisions related to LDC Members. For example Paragraph 3 of Article IV of General Agreement on Trade in Services (GATS) provides for special priority to least developed country Members taking into account their economic situation, trade and financial needs.

The discussions on S&DT provisions under the FSA acknowledge the significance of this sector in relation to the development objectives, the alleviation of poverty, the improvement of livelihood, and the assurance of food security. Furthermore, it is acknowledged that there are major differences between small and large-scale fisheries and that applying the same standards to all Members would be inequitable.[62] A fundamental element of effective S&DT includes the establishment of a transition mechanism that would gradually allow the developing Members to move out of the S&DT and implement stricter disciplines when they build the capacity to do so.[63] Topics of importance in this area include whether or not all developing Members should be made subject to the same disciplines or should be granted certain flexibility based on their development status or other special circumstances. Another issue is whether the kind of fishing activities that are covered by the S&DT should be extended only to small-

[62] Lunenborg, *supra* note 17, at 22.

[63] Vincente Paolo B. Yu III & Darlan Fonseca-Marti, *Reflecting Sustainable Development and Special and Differential Treatment for Developing Countries in the Context of New WTO Fisheries Subsidies Rules*, UNEP 1, 28 (2005), https://wedocs.unep.org/bitstream/handle/20.500.11822/25963/SD_fisheries.pdf?sequence=1&isAllowed=y.

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scale, livelihood, artisanal, low-income, resource-poor fishermen or to other categories as well.

With respect to S&DT, Article 6 of W/5 and W/20 documents provide complete exemptions to the LDC Members from the disciplines under OCOF. These specific provisions exempted the LDC Members from the requirement of prohibiting subsidies contributing to OCOF listed under Article 5.1.[64] Furthermore, it proposed to provide exemptions to Members who have been excluded from the category of LDCs for "fishing and fishing related activities within its EEZ and the area of competence of a relevant RFMO/A for a maximum of [X] years after the entry into force of a decision of the UN General Assembly to exclude that Member from the 'Least Developed Countries' category."[65]

The S&DT provisions for developing Members under W/20[66] are tied to footnote 14 of the text which placed an additional requirement that the share of the annual global volume of marine capture production of the developing countries availing the carve-out must not exceed the limit of [X percent] as per the most recently published FAO data as circulated by the WTO Secretariat. This is an example of a conditional S&DT. In the case of application of disciplines to the developing countries, the proposal provides for an exemption from the prohibitions for the proposed transition period. The proposal further sought to provide S&DT through a carve-out for the developing Members to allow such Members to provide subsidies for fishing and fishing related activities within its EEZ and the area of competence of a relevant RFMO/A. This carve-out was proposed to be provided for a maximum period of seven years after the entry into force of the Agreement or up to 2030.[67]

S&DT is a core demand for several developing Members including LDCs, especially for safeguarding the interests of the traditional and small-scale fishermen.[68] Among the developing Members, India had proposed for a transition period of twenty-five years and exemption from prohibition for providing subsidies in the EEZ extending up to 200 nautical miles for low income or resource-poor or livelihood fishing particularly for nations not involved in distant water fishing.[69] This is not in the nature of a permanent carve-out, but rather a protection of policy space to provide socio-economic security for the vulnerable fishing communities. The strong support garnered for S&DT speaks volumes of the need to prioritise the livelihood and

[64] WTO, *supra* note 28, at 5.
[65] *Id.*
[66] WTO, *supra* note 47, at 4.
[67] *Id.*
[68] PIB Delhi, *Intervention by Shri Piyush Goyal on Fisheries Subsidies Negotiations during the 12th Ministerial Conference of the WTO in Geneva*, PRESS INFO. BUREAU, GOV'T INDIA (June 14, 2022, 7:42 PM), https://pib.gov.in/Pressreleaseshare.aspx?PRID=1834001.
[69] *Id.*

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survival of the fishing community dependant on the oceans. Another possible reason for the support is the emphasis on the food security priorities of the developing countries and LDCs. As India's Commerce and Industry Minister Goyal stated, "any decision not to provide space for small-scale and traditional fishermen to expand their capabilities would only rip away their future opportunities."[70] The African, Caribbean, and Pacific (hereinafter "ACP") Group too had expressly proposed to exclude small-scale fishing from the scope of this discipline.[71]

As subsidies for low income or resource-poor or livelihood fishing are a core demand, ideally disciplines on OCOF should provide a carve-out for such subsidies. The requirement of demonstration for availing sustainability based carve-out for supporting fishermen including the small-scale and artisanal fishermen for fishing activities with their own EEZ would lead to enhanced scrutiny. The demonstration requirement has its own challenges. If demonstration becomes a requirement, only countries with advanced measurement systems could get the benefit. The African Group, India, and Indonesia, among others, have raised serious concerns regarding the flexibilities that the big subsidizers such as the EU, China, Japan, and Canada will enjoy under the provisions of the sustainability criterion.[72] South Africa's intervention focused on the aspect of flexibility for large subsidisers stating that the sustainability-based flexibility is favouring the large subsidisers who have well developed fisheries sectors.[73] The sustainability approach has been advanced by Members such as the EU and Japan and supported by Members such as Australia, New Zealand, Canada, and Norway.[74]

Several developing Members have proposed for the need to provide requisite technical assistance and capacity building for the developing Members to enable them to implement these disciplines. The approach of adequate technical assistance and capacity building along with a lesser degree of commitment, de-minimis flexibilities, extended time period for fulfilling the obligations under the discipline, etc., can be effective ways of incorporating the necessary S&DT.[75] However, prohibition on the basis of a de-minimis in terms of annual marine capture sets an absolute capping. An absolute capping approach that does not take into account the size of the

[70] PIB Delhi, *supra* note 68.
[71] D. Ravi Kanth, *Trade: ACP Group Exposes Asymmetries in Chair's Draft Fisheries Text*, THIRD WORLD NETWORK (Sept. 25, 2023), https://www.twn.my/title2/wto.info/2023/ti230915.htm.
[72] Kanth, *supra* note 51.
[73] D. Ravi Kanth, *Developed Countries Support Harmful Fisheries Subsidies at WTO*, THIRD WORLD NETWORK (June 3, 2021), https://twn.my/title2/wto.info/2021/ti210602.htm.
[74] Mukesh Bhatnagar, *Emerging Disciplines on Fisheries Subsidies Negotiations in the WTO and the Relationship with Other International Instruments on Fisheries - A Tight Rope Walk*, 13(2) TRADE L. & DEV. 369, 384 (2021).
[75] *See* Tipping & Irschlinger, *supra* note 48, at 10.

nation or the population, dimension of the coastline, kind of fishermen involved in the activity, the fishing fleet, etc., appears to be unjustified and arbitrary. The efficacy of this approach is questioned as it depends on the availability of information regarding the overall production and the amount of subsidies provided over a given period. In addition, an efficient notification mechanism is required for ensuring that de minimis criteria are accurately implemented.[76] The ACP Group highlighted the need to change the paradigm based on the substantive issues leading to OCOF.[77]

As the FSA is a sustainability-based agreement, S&DT provisions are an agreed part of the mandate for the negotiations. Consequently, the principle of Common But Differentiated Responsibilities-Respective Capabilities (hereinafter "CBDR-RC") must be considered while negotiating the discipline on fisheries subsidies. The concept of CBDR-RC is a fundamental principle of international environmental law, and more recently was embedded in the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC").[78] The Rio Declaration recognised the correlation between a state's level of development and its contribution to the degradation of the environment.[79] It is based on the concept of intergenerational equity as provided under Principle 6 of the Rio Declaration.[80]

To emphasize the connection between the FSA and environmental objectives, SDG 14 seeks to prohibit fisheries subsidies that contribute to OCOF and illegal, unreported, and unregulated fishing. It is important to note that the UNSDG reaffirms the significance of the CBDR-RC principle, as set out in the Rio Declaration, as one of the shared principles and commitments guiding the attainment of the UNSDGs.[81] Further, it must be mentioned that the idea of "leaving no one behind" is anchored in the SDGs Agenda 2030.[82]

The discussions on the S&DT provisions have fuelled the debate on maintaining an appropriate balance between ensuring environmental sustainability while pursuing trade interests. It has also built up tension as the developed countries have raised concerns that "flexibility for continued subsidization of large-scale industrial fishing capacity and effort within EEZs could put national stocks at risk of overcapacity and overfishing in the

[76] Yu III & Marti, *supra* note 63, at 23.
[77] Kanth, *supra* note 71.
[78] United Nations Framework Convention on Climate Change, art. 3.1, 1994, 1771 U.N.T.S 107.
[79] Rep. of The United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. I) (1992).
[80] *Id*.
[81] *Transforming Our World: the 2030 Agenda for Sustainable Development*, U.N., https://sdgs.un.org/2030agenda.
[82] *Leave No One Behind*, U.N., https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind (last visited Mar. 17, 2024).

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medium term."[83] Most developed countries are of the view that in the event the carve-outs lead to subsidisation causing depletion of stocks, it would increase the risk and undermine the intention of the Members to achieve sustainable fisheries.

The discussions on this issue suggest that the developed Members would not support a permanent carve-out from disciplines for S&DT such as a permanent exemption for fishing or fishing related subsidies in the EEZ of the developing Members. A number of developed Members are of the view that it would be essential to impose certain restrictions so as to prevent the depletion of stock which is essential for the survival of the vulnerable coastal communities. In other words, if subsidization can lead to depletion of fish stocks, S&DT could also undermine the abilities of developing Members to build profitable and sustainable fisheries in the long term.[84]

The Chair in its recent proposal of December 21, 2023,[85] proposed varied flexibility under S&DT including complete carve-out from the disciplines for LDC Members under Article B.1, and exemption for Members under Article B.2 if their share of the annual global volume of marine capture production does not exceed 0.8% in accordance with the recently published FAO data. For the remaining developing Members, the Chair's text under Article B.3 has proposed a transition period of [X] years for the application of disciplines as well as an exemption from dispute settlement under Article 10 of the FSA for two additional years with a possibility for an extension. Moreover, an exemption for low-income, resource poor and/or livelihood fishing up to 12/24 nautical miles has been proposed as part of the S&DT. There is also a proposal for exclusion of distant water fishing nations from availing the benefits under S&DT. In this text, the concept of distant water fishing has been proposed as a qualifier for availing S&DT rather than a criterion for disciplines under Article A.

4. Distant Water Fishing — According to Enric Sala et al.,

> while the amount of fish landings has increased more than five times over the past 50 years as a result of industrialized fishing activities, more than three-quarters of commercially valuable fish stocks (especially of large predatory fish) are now mostly overexploited, fully exploited, significantly depleted, or slowly recovering from overexploitation.[86]

[83] Alice Tipping, *Addressing the Development Dimension of an Overcapacity and Overfishing Subsidy Discipline in the WTO Fisheries Subsidies Negotiations*, IISD (2020), https://www.iisd.org/system/files/publications/overfishing-discipline-wto-fisheries-subsidies.pdf.
[84] *Id*. at 5.
[85] WTO, *supra* note 59, at 3.
[86] Yu III & Marti, *supra* note 63, at 1.

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Secondary literature also indicates that high sea fishing is enabled by large government subsidies, without which as much as 54% of the present high seas fishing would be unprofitable at the existing fishing rates.[87]

Many WTO Members fish within their own FAO area.[88] However, there are several WTO Members fishing beyond the FAO area.[89] For instance, in 2017, Japanese vessels caught fish from fifteen different FAO marine fishing areas and can therefore be assumed to be very active in distant water fishing (hereinafter "DWF").[90] The same applies for the EU, Korea, China, Russia, the UK, and the US, among other fishing nations (see Figure 3).[91] The vessels that operate in such FAO marine fishing areas are likely to contribute to overcapacity, leading to declining fishery resources, 90% of which are fully fished or overexploited.[92] A 2020 FAO study found that one-third of all global fish populations are overfished, and that another 60% are being fished at maximum exploitation levels with no room for increased fishing activity.[93] Most of such studies portray extremely pessimistic projections.

Members engaged in distant water fishing are referred to as Distant Water Fishing Nations (hereinafter "DWFNs"). To restate, fishing that is carried out within the Member's own area as per the FAO major fishing area will not be deemed to be DWF. Several WTO Members are bordering more than one fishing area. Examples include the United States which borders at least four (4) FAO marine fishing areas; Australia three (3); South Africa three (3); and India two (2).[94]

By pushing DWFNs to operate on the high seas where there are straddling stocks of highly migratory species, the subsidized operations could take resources away from other unsubsidized fleets, especially the

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[87] Enric Sala et al., *The Economics of Fishing the High Seas*, 4 SCI. ADVANCES 1, 1 (2018).

[88] COORDINATING WORKING PARTY ON FISHERY STATISTICS: MAIN WATER AREAS, https://www.fao.org/cwp-on-fishery-statistics/handbook/general-concepts/main-water-areas/en/?page=20&0=&1= (last visited Dec. 26, 2023).
FAO major fishing areas are areas designated for statistical purposes, whose boundaries are determined in consultation with international fishing agencies after taking into account considerations such as boundary of natural regions, boundary of adjacent statistical fisheries bodies, national boundaries, national practices, the longitude and latitude, distribution of aquatic fauna and distribution of resources and environmental conditions. At present there are a total of 27 major fishing areas.

[89] LANDINGS FROM DISTANT WATER FISHERIES, https://www.fao.org/3/W3244E/w3244e09.htm (last visited Dec. 21, 2023). As per FAO data, "[l]andings from 'distant waters' refers to quantities taken by vessels in all FAO major fishing areas other than those adjacent to the flag State." This definition implies that fisheries taking place outside the EEZ of the flag State but within the same major fishing area are not considered distant water fisheries.

[90] Lunenborg, *supra* note 17, at 30.

[91] *Id*.

[92] SALLY YOZELL & AMANDA SHAVER, SHINING A LIGHT: THE NEED FOR TRANSPARENCY ACROSS DISTANT WATER FISHING 12 (2019).

[93] FAO, THE STATE OF WORLD FISHERIES AND AQUACULTURE 2020: SUSTAINABILITY IN ACTION 47-48 (2020).

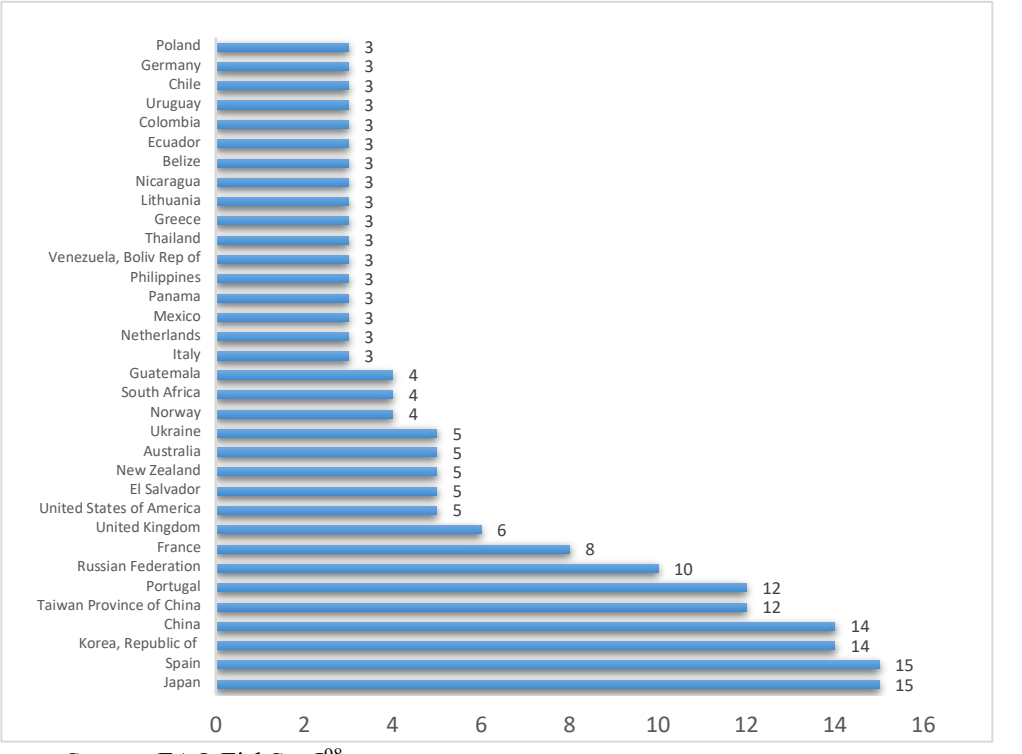
[94] Lunenborg, *supra* note 17, at 30.

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fishing fleets of developing countries.[95] In other words, even according to the FAO, developing countries are often the target of DWF activity. The FAO further notes that three of the top five EEZs that receive the most distant water fishing effort through harmful subsidies are Papua New Guinea, Micronesia and Mauritania, which are developing countries with small economies.[96] It is often the case that the developing nations or even the small economies become the target of DWF activity by large subsidisers. These subsidies not only impact the fish stock but also distort the market access opportunities to developing countries which can have a direct consequence for the socio-economic conditions of the people who depend on the oceans in these regions.[97] It is widely believed that DWF is one of the major contributors to OCOF.

[95] Committee on Trade and the Environment, *Environmental and Trade Benefits of Removing Subsidies in the Fisheries Sector*, WTO Doc. WT/CTE/W/51 (May 19, 1997).
[96] MOST LONG-DISTANCE FISHING IN FOREIGN WATERS DOMINATED BY ONLY A FEW GOVERNMENTS, https://pew.org/3G40M92 (last visited Dec. 21, 2023).
[97] Yu III & Marti, *supra* note 63, at 11.

FIGURE 3: Fish Capture by Number of FAO Marine Fishing Areas (2017)



Source: FAO FishStatJ[98]

The concept of DWF did not feature in the initial discussion on the FSA while it was negotiated.[99] The initial drafts did not have a discipline based on DWF which kept large subsidisers outside the scope of the discipline, specifically in relation to DWF. However, the secondary literature on this issue highlighted the impact of DWF on the conservation and management of fisheries. Gradually the discussion around DWF gained importance as large scale industrialised fishing nations looked for ways to exploit the resources of the other Members. The most recent updates from the negotiations suggest that the Members have started proposing stricter disciplines on DWF during the negotiations on OCOF that took place during the Fish Week Sessions of the WTO held from September to December 2023.[100] The discussions suggest that the new texts provide an option of strict provisions on DWF that require extra transparency and scrutiny for the large

[98] Authors' Representation based on FAO FishStatJ. *See* Lunenborg, *supra* note 17, at 30 (Note: This image illustrates the fishing activity of members in the FAO marine fishing areas.)
[99] WTO, *supra* note 47.
[100] Ungphakorn, *supra* note 52.

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subsidisers.[101] The criteria for defining the DWFN is especially hard to negotiate. Reportedly, the developing Members have argued against providing the facade of sustainability to big subsidizers who merely have to demonstrate that measures have been implemented to maintain the level of fisheries at a biologically sustainable level. According to the developing Members, such a carve-out would defeat the purpose of having otherwise strict disciplines for DWFNs .

As there is a lack of an internationally recognised definition of DWF, the Members may adopt the criteria provided by the FAO or they may negotiate a new definition specifically catering to the objective of the Agreement. Furthermore, there is a need to have a definition that caters to the requirement under the FSA as there is no unanimously agreed definition as well. Reportedly during the negotiations, some Members have defined DWF as fishing or fishing related activities beyond the FAO major fishing areas that is (are) adjacent to the natural coastline of a Member.[102]

Accordingly, in its latest proposal, India has proposed that DWFN reduce their capacities in a calibrated manner and that there should be a moratorium on subsidies provided by DWFNs for fishing or fishing related activities beyond their EEZ for twenty-five years.[103] India is opposed to a sustainability carve-out for conservation and management for DWFN as provided under Article 5.1.1 of the original proposal.[104]

Apparently, there is a need for curbing the activities of the DWFNs as they already possess or exceed the required capacity; consequently, their fisheries sector can continue to benefit even if the subsidies are prohibited now. On the contrary, when the disciplines on OCOF is concluded, the developing Members might struggle to provide the requisite support to their fisheries sector. The OCOF appears to be a discipline to maintain the status quo and restrict the new entrants for fishing and fishing related activities. The Chair in its proposal of December 21, 2023,[105] has provided that the S&DT available to developing Members shall not be extended to DWFNs by stating that "a developing country Member engaged in fishing or fishing related activities in any area further than one FAO Major Fishing Area beyond the one(s) adjacent to its natural coastline shall not have access to Articles B.1, B.2, B.3, and B.4."[106]

There are also debates around the government-to-government (hereinafter "G-to-G") payments under access agreements and the

[101] *Id*.
[102] D. Ravi Kanth, *WTO: Chair to discuss "legal form of new disciplines" on fisheries subsidies*, THIRD WORLD NETWORK (Dec. 21, 2023, 11:40 AM), https://www.twn.my/title2/wto.info/2023/ti231118.htm.
[103] PIB Delhi, *supra* note 68.
[104] *Id*.
[105] WTO, *supra* note 59.
[106] *Id*. at 4, Article B.6.

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desirability of keeping such payments outside the scope of the Agreement. G-to-G payments are generally included as a part of the access agreements which provide access rights to fish in foreign EEZ in the form of fee or reciprocal access to fisheries.[107] These access agreements can constitute a significant source of income for some developing countries, in particular the LDCs.[108] Case studies from Senegal and Argentina have highlighted how DWFNs who overexploited and allowed the collapse of fisheries in their own waters have moved to distant waters to make use of their excess capacity through bilateral access agreements.[109] The payer government may further transfer the access rights (which have been acquired from another member government to fish within their jurisdiction) in the form of a support implemented, in most cases, through inadequate consideration or in exchange of insufficient payments.[110] This may lead to conferring of a benefit when access rights to fish in foreign EEZ are given to the fishing fleet or vessels for less than full consideration. The transfer of access rights by the payer Member to fish in the waters of another Member is a matter of grave concern. In such situations, it is essential to determine whether such activities will be included as a part of the OCOF disciplines. There is an ongoing debate among the WTO Members regarding the potential treatment of such benefits under the OCOF disciplines. According to some developing Members, such exclusion can lead to circumvention of the subsidy disciplines by permitting certain Members to enter into bilateral or circuitous agreements and avoid the recovery of subsidy paid to the commercial players.[111]

IV. CONCLUSION

This article provided a summary of the developments and events that led to the FSA under the auspices of the WTO. The article examined the key issues for the formulation of a discipline on subsidies contributing to OCOF negotiations within the context of WTO fisheries subsidy negotiations. It is amply clear that the WTO Members have vastly varying economic conditions; while certain Members grant subsidies for increasing output or

[107] Marcos A. Orellana, *EEZ Fisheries Access Arrangements and the WTO Subsidies Agreement: Legal Analysis and Options for Improved Disciplines*, CIEL 11 (Dec., 2007), https://www.ciel.org/reports/eez-fisheries-access-arrangements-and-the-wto-subsidies-agreement-legal-analysis-and-options-for-improved-disciplines-orellana-december-2007-2/.
[108] *Id*. at 4.
[109] *Id*.
[110] Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶¶ 84-85, WTO Doc. WT/DS257/AB/R (adopted Feb. 17, 2004).
[111] D. Ravi Kanth, *Trade: India Turns the Tables Against Big Subsidizers in Doha Fisheries Talks*, THIRD WORLD NETWORK (Dec. 21, 2023, 11:50 AM), https://www.twn.my/title2/wto.info/2023/ti2309 13.htm.

maintaining fisheries stock at biologically sustainable levels, a majority of Members, especially developing Members, grant subsidies to support income security and livelihood security for their fishermen. In that context, there is a need to balance the environmental mandate of the Agreement and the trade and economic interests of this hugely important sector.

In the discussions on developing disciplines on OCOF, several proposals have been tabled. The list-based approach is potentially sensitive for several WTO Members, especially developing Members, as they want to retain the policy space to extend government support for certain fishing operations or investment. In addition, the presumption that all activities identified in the list have the potential to contribute to OCOF is also problematic. This presumption would not always be true for the developing Members that are operating at minimal or nil capacity. In such a situation there could be a need to provide targeted income support or other assistance to the fishermen especially during the breeding season in order to allow spawning and recovery of the fish stocks so as to maintain biological sustainability. A list-based approach could potentially cripple the ability of several developing Members and small economies to develop their fishing infrastructure and practice sustainable fishing. There is a likelihood that the OCOF negotiations may ultimately embrace a hybrid approach.

There is strong evidence, as explained in the previous parts of this article, that the ongoing subsidies encourage distant water fishing. The sustainability exemptions of subsidies for DWF may also undermine the long-term objectives of the FSA. There is a need, greater than ever before, to introduce curbs on the ability of the Members to engage in DWF, especially if the ability to engage in DWF was gained through state support. It is a positive sign that Members have proposed stricter disciplines on DWF with a view to ensuring long term sustainability of the oceans. Equally important is the role played by RFMOs/As in ensuring ocean sustainability.

Overall, there is a need to ensure that the fish stocks are utilised sustainably keeping in mind the principles of CBDR-RC and the status of the fishing capacity. The problems associated with large scale industrialised fishing should form the crux of the fisheries subsidies discussions.

The last part of the article has conceptually deliberated upon the various challenges in disciplining the subsidies under OCOF and the different approaches from the perspective of developed and developing Members. These approaches cannot be understood in a silo setting; rather they must be evaluated holistically to achieve the ultimate objective of this Agreement. Approaches can be designed to provide the appropriate balance of rights and obligations to further the discussion among the Members.

The negotiations at MC 13 did not lead to the adoption of OCOF disciplines as a part of the additional provisions. Despite extensive deliberations, Members could not agree on significant issues such as a

methodology for classification of the Members in Tier one and Tier two, discipline of DWF, S&DT carve-out for small scale and artisanal fishermen and so on. The differences will have to be resolved in the negotiations post MC 13 to find an acceptable framework for disciplining subsidies contributing to OCOF.

There is hope that future negotiations could provide an approach with triple benefits: namely, disciplines for overcapacity and overfishing for appropriate balance of fishing capacity; special and differential treatment for the developing Members including the LDCs; and an appropriate balance of trade and sustainability. The process for achieving these goals may be long and arduous, however once concluded, these disciplines will be crucial for the holistic application of the FSA.

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