CONVERGE OR DIVERGE? THE NEW FISHERIES SUBSIDIES AGREEMENT AND THE SCM AGREEMENT

Jaemin Lee*

ABSTRACT

The new Fisheries Subsidies Agreement (hereinafter "FSA") is an important achievement for the conservation of global fish stocks. It is the first environment-focused covered agreement of the World Trade Organization (hereinafter "WTO") and is now expected to play a critical role in helping conserve fast depleting global fish stocks and at the same time reinvigorate weakening multilateralism. In the meantime, the new agreement also raises critical structural questions. While the agreement is based and built upon the basic template of the Subsidies and Countervailing Measures Agreement (hereinafter "SCM Agreement"), the relationship between the two does not seem to be entirely clear. As the FSA currently stands, there appear to be notable structural gaps or systemic uncertainties between the new agreement on the one hand and the SCM Agreement on the other. These gaps or uncertainties would arguably deserve the careful attention of the WTO Members in the course of bringing the new agreement into force and implementing it as a critical covered agreement. The structural

* Ph.D., LL.M., LL.B. (Seoul National University); LL.M. (Georgetown University Law Center); J.D. (Boston College Law School). Professor of Law, School of Law, Seoul National University, Seoul, Korea. The author can be reached via email at jaemin@snu.ac.kr. This article is based on the presentation made at the conference on September 18, 2023 entitled "The Architecture of the 2022 Fisheries Subsidies Agreement: Sustainability, Faithful Implementation and Beyond" hosted by the Asian Center for WTO and International Health Law and Policy and National Taiwan University College of Law. The research for this article was supported by the 2024 Research Fund of the Seoul National University Law Research Institute, donated by the Seoul National University Law Foundation. All internet links cited in the article were last visited on December 20, 2023.

臺大學術期刊

relationship between the FSA and the SCM Agreement should be elaborated and clarified with respect to key operational provisions of the former, in particular as regards (i) general infrastructure exception, (ii) ex post facto prohibition, and (iii) benefit calculation.

KEYWORDS: *fisheries subsidies, SCM Agreement, Sustainable Development Goals, general infrastructure, prohibited subsidies, benefit calculation*

臺大學術期刊資料庫

Table of Content

I. Introduction 105
II. Incorporating the Framework of the SCM Agreement 106
A. Basic Structure of the FSA 107
B. SCM Agreement Elements 108
III. Outstanding Compatibility Questions 111
A. General Infrastructure Exception 112
B. Amorphous Nature of a Subsidy Program 118
C. Reversed Benefit Assessment 126
IV. Future Course of Action 130
A. Healthy Debates, Not Undermining the Momentum 132
B. Fine-Tuning and Elaboration 133
C. FSA's Entry into Force Critical 134
D. DSM Restoration Critical 136
V. Concluding Thoughts 137

I. INTRODUCTION

The *Agreement on Fisheries Subsidies* (hereinafter "FSA"), adopted during the 12th Ministerial Conference (hereinafter "MC-12") of the World Trade Organization (hereinafter "WTO") on June 17, 2022,[1] represents a significant milestone for ocean sustainability and fish stock preservation.[2] It addresses the critical issue of harmful fisheries subsidies which contribute to the over-exploitation of global fish stocks. As a matter of fact, this agreement is historic on multiple fronts: it marks the *first* Sustainable Development Goal (hereinafter "SDG") target to be fully achieved, and the *first* SDG target attained through a multilateral agreement. It is also the WTO's *inaugural* environment-focused agreement, the *first* comprehensive multilateral pact concerning ocean sustainability, and only the second WTO-covered agreement newly adopted by the Members since the organization's inception in 1995.[3] By any measure, the FSA is indeed a remarkable and epoch-making achievement.[4] Furthermore, it offers an opportunity to turn the tide

[1] *See* World Trade Organization [hereinafter WTO], Agreement on Fisheries Subsidies, at 1, WTO Doc. WT/MIN(22)/33 (June 22, 2022) [hereinafter FSA].
[2] *See id.*
[3] According to the WTO Director-General Ngozi Okonjo-Iweala, the FSA "Represents a major historic achievement, as the first WTO agreement to place an environmental objective at its core, as well as the first broadly-focused binding multilateral agreement on ocean sustainability." *See* Alice Tipping, *WTO Members Clinch a Deal on Fisheries Subsidies*, INT'L INST' FOR SUSTAINABLE DEV. [hereinafter IISD] (June 17, 2022), https://sdg.iisd.org/news/wto-members-clinch-a-deal-on-fisheries-subsidies/.
[4] *See Implementing the WTO Agreement on Fisheries Subsidies*, WTO (2022), https://w

against the weakening multilateralism,[5] by "boost[ing] the confidence of all [M]embers in multilateralism."[6]

At the same time, as much as the new agreement is important and ground-breaking, the WTO Members now need to view it from a 'structural' point of view with the relevant WTO Agreements in mind. In particular, the FSA is anchored on the basic framework of the WTO *Agreement on Subsidies and Countervailing Measures* (hereinafter "SCM Agreement"),[7] one of the WTO covered agreements regulating subsidies administered by Members generally. As a matter of fact, the FSA contains direct references to the SCM Agreement in many places in the text. Thus, arguably the FSA should be understood, interpreted and implemented with the SCM Agreement as an overarching theme in the background. The tight interlinkage notwithstanding, however, there seems to be notable structural gaps or systemic uncertainties between the FSA and the SCM Agreement, which would require the attention of the Members going forward with the entry into force and implementation of this novel and critical legal endeavor. This article aims to analyze these structural gaps or systemic uncertainties.

Most importantly, it should be noted that this article is not intended to criticize the FSA in any manner; it is an important stride in the right direction at the right time. Rather, the purpose of this article is to help the WTO Members identify areas that demand further discussion and elaboration for the ultimate success of this new covered agreement.

This article is structured as follows. Section II explains the basic structure of the FSA together with its close linkage to the SCM Agreement. Section III then examines issues that raise compatibility questions between the FSA and the SCM Agreement. What needs to be done to address those compatibility questions is then discussed in Section IV. Finally, Section V concludes.

II. INCORPORATING THE FRAMEWORK OF THE SCM AGREEMENT

Historically, as subsidization measures of Members, fisheries subsidies have been subject to the SCM Agreement which regulates such measures generally[8] except for agricultural subsidies to be regulated by a separate

---

ww.wto.org/english/res_e/booksp_e/impfishag_dgmessage_e.pdf.

[5] *See* Bernard M. Hoekman et al., *Managing Externalities in the WTO: The Agreement on Fisheries Subsidies*, 26(2) J. INT'L ECON. L. 266, 283 (2023).

[6] *See* CHINA FORMALLY ACCEPTS AGREEMENT ON FISHERIES SUBSIDIES, https://www.wto.org/english/news_e/news23_e/fish_27jun23_e.htm (last visited Feb. 9, 2024).

[7] *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, 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 [hereinafter SCM Agreement].

[8] *See* WTO Committee on Trade and Environment, *GATT/WTO Rules on Subsidies and Aids Granted in the Fishing Industry*, at 1, WT/CTE/W/80 (Mar. 9, 1998).

covered agreement, i.e., the WTO *Agreement on Agriculture*.[9] As the FSA came from the negotiations aimed to clarify and improve provisions in the SCM Agreement for the purpose of specifically regulating subsidies on fisheries, the FSA and the SCM Agreement naturally share many of the fundamental core concepts, such as what constitutes a "subsidy" or how to determine "specificity".[10] Needless to say, sharing the definitions of core concepts will indeed contribute to the internal coherence and consistency of the WTO regime.[11] Thus, the FSA builds on the existing legal framework regulating subsidies under the SCM Agreement, and "additionally prohibit[s] the three categories of fishing subsidies"; they are subsidies for (i) Illegal, Unreported, and Unregulated (hereinafter "IUU") fishing (Article 3), (ii) overfished stock fishing (Article 4), and (iii) unregulated high seas fishing (Article 5).[12] The legal platform of the FSA, therefore, is borrowed from the SCM Agreement.

A. Basic Structure of the FSA

The FSA is structured as follows. It has twelve articles. Article 1 defines the scope of the FSA: the FSA shares the subsidy definition and specificity requirement of the SCM Agreement (as set forth in Articles 1.1 and 2 of the SCM Agreement), and among subsidies so determined, those provided for marine wild capture fishing and fishing-related activities conducted at sea then fall under the scope of the FSA. Based on this general architecture, Article 2 of the FSA defines the terms used in the agreement.

Critically, Article 3 requires the WTO Members to stop providing subsidies to vessels and operators involved in IUU fishing when such involvement is known. Article 4 further prohibits subsidies for fishing or fishing-related activities regarding an overfished stock. The article also mandates the Members to assess whether they have measures in place for rebuilding overfished stocks when they continue to subsidize their fishing activities. Article 5 then prohibits subsidies for fishing activities in unregulated high seas.

In addition, Article 6 of the FSA mandates the Members to exercise due restraint when approaching issues involving the least-developed country (hereinafter "LDC") Members with according caution and by considering the

---

[9] *See* Agreement on Agriculture, Apr. 15, 1994, Marrakesh agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 410.

[10] *See Summary of the Agreement and What It Means for Developing Country and Least-Developed Country Members*, WTO (2022), https://www.wto.org/english/res_e/booksp_e/impfishag part_2 _e.pdf (last visited Feb. 9, 2024); *WTO Fisheries Subsidies Negotiations*, CONG. RSCH. SERV. (2023), https://crsreports.congress.gov/product/pdf/IF/IF11929.

[11] *See* Mitchell Lennan & Stephanie Switzer, *Agreement on Fisheries Subsidies*, 38 INT'L J. MARINE & COASTAL L. 161, 165 (2023).

[12] *See* Hoekman et al., *supra* note 5, at 268.

unique circumstances of such Members in implementing the agreement. Article 7 establishes a WTO funding mechanism designed to offer technical assistance and capacity building to developing countries and LDCs, aiding them in the effective implementation of the agreement. Article 8 sets forth notification and transparency provisions.

Article 9 then establishes a committee for fisheries subsidies, responsible for reviewing information provided by the Members and assessing the implementation of the agreement. Article 10 stipulates dispute settlement proceedings. Article 11 includes final provisions, allowing subsidies in cases of disasters, and declaring that any determination from the FSA will have no legal implications for territorial claims or delimitation of maritime boundaries. Finally, Article 12 is the termination clause, stating that the agreement will end if more comprehensive rules are not adopted within four years of its entry into force unless the General Council decides otherwise.

B. SCM Agreement Elements

The FSA is a stand-alone covered agreement of the WTO. Thus, in principle, it has to be interpreted and applied on its own, independent of other WTO-covered agreements.[13] At the same time, setting aside the historical background which shows the SCM Agreement as the origin of the fisheries subsidies discussion, there are several places in the FSA where the SCM Agreement is specifically mentioned for reference.

First, Article 1 stipulates that the scope of the fisheries subsidies is determined by the SCM Agreement. It provides:

> Article 1: Scope
>
> This Agreement applies to subsidies, within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that are specific within the meaning of Article 2 of that Agreement, to marine wild capture fishing and fishing-related activities at sea. (emphasis added)

Thus, any determination of a subsidy under the FSA is to be done by following the legal standard of the existing SCM Agreement. This is the provision to import core jurisprudence of the WTO subsidies regulation developed by the SCM Agreement into the FSA. This provision is all the more important because the existence of a subsidy is the starting point of the

[13] *See* Kadijatu Zainab Bangura & Abraham Zaqi Kromah, *The WTO's Fisheries Subsidies Agreement: What's New and What's Next?*, 17(10) GLOB. TRADE & CUSTOMS J. 431, 434-35 (2022); Tristan Irschlinger & Alice Tipping, *A Draft WTO Agreement on Fisheries Subsidies: What's on the Table?*, IISD 1, 17-20 (2022).

臺灣期刊資料庫

application of the FSA in the first place.

The FSA also incorporates into its folder the notification mechanism of the SCM Agreement. The FSA stands to utilize the existing notification system of Article 25 of the SCM Agreement for the collection and dissemination of fisheries subsidies information and data, a critical component of the operation of the new agreement. Accordingly, Article 8.1 and the attendant footnote of the FSA mention Article 25 of the SCM Agreement in many places:

> Article 8 Notification and Transparency
>
> 8.1 *Without prejudice to Article 25 of the SCM Agreement* and in order to strengthen and enhance notifications of fisheries subsidies, and to enable more effective surveillance of the implementation of fisheries subsidies commitments, each Member shall
>
> (a) provide the following information as part of its regular notification of fisheries subsidies *under Article 25 of the SCM Agreement* (footnote 12): type or kind of fishing activity for which the subsidy is provided;
>
> (Footnote 12) For the purpose of Article 8.1, Members shall provide this information in addition to all the information required under *Article 25 of the SCM Agreement* and as *stipulated in any questionnaire utilized by the SCM Committee*, for example G/SCM/6/Rev.1.
>
> (b) provide the following information as part of its regular notification of fisheries subsidies under *Article 25 of the SCM Agreement*: (i) status of the fish stocks in the fishery for which the subsidy is provided . . . . (emphasis added)

If anything, Article 8.1 of the FSA makes it clear that the new agreement uses the same procedural vehicle for subsidies which have been established and overseen by the SCM Agreement since 1995. In addition, Article 8.7 further includes a 'peace' clause that notification by a Member in and of itself does not prejudge the legal status of the measure as follows:

> 8.7 Members recognize that notification of a measure does not prejudge (a) *its legal status under General Agreement on Tariffs and Trade (GATT) 1994, the SCM Agreement*, or *this Agreement*; (b) *the effects of the measure under the SCM Agreement*; or (c) the nature of the measure itself. (emphasis added)

臺大學術期刊資料庫

The above provision specifically lists the SCM Agreement. Any governmental measure to be reported under Article 8 of the FSA will not be

determined to be a "subsidy" under the SCM Agreement or a "fisheries subsidy" under the FSA by the notification itself. On top of this, the *effect* of the notified measure under the SCM Agreement should not be prejudged either. As the WTO *General Agreement on Tariffs and Trade of 1994* (hereinafter "GATT 1994")[14] also contains a general provision regulating subsidies,[15] Article 8.1 also lists GATT 1994 as another covered agreement under which the legal status of the reported fisheries subsidies measure should not be evaluated. These multiple references to the SCM Agreement and the GATT 1994 for that matter signify close interlinkage between the FSA and the SCM Agreement. The linkage further stands out given the critical importance placed on the notification obligation of various measures in question under the rubric of the FSA.

In addition, Article 10 of the FSA decides to adopt and apply the dispute settlement proceedings specifically designed for the SCM Agreement to resolve all the disputes arising under the new agreement. Article 10 of the FSA thus provides:

> Article 10: Dispute Settlement
>
> Article 10.2 Without prejudice to paragraph 1, the provisions of *Article 4 of the SCM Agreement (Footnote 18) shall apply to consultations and the settlement of disputes under Articles 3, 4 and 5 of this Agreement*.
>
> (Footnote 18) For purposes of this Article, the term "prohibited subsidy" in *Article 4 of the SCM Agreement refers to subsidies subject to prohibition in Article 3, Article 4 or Article 5 of this Agreement*. (emphasis added).

Given the importance of the dispute settlement proceedings of the WTO Agreements and the unique aspects of the dispute settlement proceedings contained in Article 4 of the SCM Agreement, distinct from the ordinary proceedings in the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter "DSU"), [16] the unqualified incorporation of the dispute settlement proceedings of the SCM Agreement into the FSA speaks volume of the close interlinkage between the two agreements within the WTO regime.

Finally, Article 11.5 of the SCM Agreement clarifies that the FSA does

---

[14] *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

[15] *See id*. art. VI.

[16] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

臺大學術期刊資料庫

not change the SCM Agreement at all and each provision of the SCM Agreement remains intact despite the adoption of the FSA. It thus provides:

> Article 11: Final Provisions
> 11.5 This Agreement does *not modify or nullify any rights and obligations as provided by the SCM Agreement*. (emphasis added).

The specific reference to the SCM Agreement in Article 11.5, among all the covered agreements of the WTO, recognizes in and of itself the close relationship between the FSA and the SCM Agreement. Also, this provision clarifies that all rights and obligations of the SCM Agreement together with its existing jurisprudence should continue to apply even after the entry into effect of the FSA. Thus, in short, the SCM Agreement remains intact despite the FSA (Article 11.5), and in turn, the core elements of the SCM Agreement apply to the FSA (Articles 1, 8 & 9).

These multiple references to the SCM Agreement in the FSA arguably show that (i) the basic structure of the FSA is based on the SCM Agreement; (ii) the FSA borrows key terms and conditions from the SCM Agreement; and (iii) the operation of the FSA requires close coordination with the SCM Agreement. As noted above, the very definition of a fisheries subsidy—the very starting point of the application of the FSA—is taken from the definitions of the SCM Agreement, and the settlement of disputes for fisheries subsidies—the end point of the application of the FSA—also directly incorporates relevant provisions of the SCM Agreement. If anything, therefore, the entire cycle of a fisheries subsidies dispute under the FSA is structured with the SCM Agreement center stage. One could argue that the FSA and the SCM Agreement, although two separate covered agreements of the WTO, are so closely intertwined and interlocked that one cannot stand alone without the other.

III. OUTSTANDING COMPATIBILITY QUESTIONS

The question then is how the SCM Agreement would affect the new FSA. Notably, the FSA should not affect the SCM Agreement.[17] As the SCM Agreement defines the outer parameter of the FSA,[18] and as it regulates dispute settlement of the FSA, the former stands to affect the latter significantly and throughout. In that respect, the following three issues need further deliberation and elaboration.

臺大學術期刊資料庫

[17] *See* FSA, *supra* note 1, art. 11.5.
[18] *See* FSA, *supra* note 1, art. 1.

A. General Infrastructure Exception

A financial contribution by the government, one of the components that constitute a subsidy under the SCM Agreement, contains one critical exception; i.e., subsidies granted for the construction or establishment of "general infrastructure" are exempted from the financial contribution by the government.[19] Such subsidies, therefore, are not subject to the SCM Agreement in the first place.[20] As such, a Member's provision of subsidy to the general infrastructure such as ports, harbors, rural towns or coastal towns may not constitute a financial contribution, hence no subsidy exists within the meaning of the SCM Agreement. Article 1.1 of the SCM Agreement sets forth in the pertinent part:

> Article 1.1 of the SCM Agreement
> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
> (iii) a government provides goods or services *other than general infrastructure*,[21] or purchases goods; (emphasis added).

In *EC and Certain Member States — Large Civil Aircraft*, the WTO panel developed an interpretation of the concept of "general infrastructure":

> Dictionaries define the term "infrastructure" as, inter alia, "installations and services (power stations, sewers, roads, housing, etc.) regarded as the economic foundation of a country . . . ." The term "general" is defined as "including, involving, or affecting all or nearly all the parts of a (specified or implied) whole as a territory, community, organization, etc. . . ." and "involving, applicable to, or affecting the whole . . . ." We consider that the term "general infrastructure", taken in its ordinary and natural meaning, refers to infrastructure that is not provided to or for the advantage of only a single entity or limited group of entities, but rather is available to all or nearly all entities. In our view, this interpretation is consistent

---

[19] *See* SCM Agreement, *supra* note 7, art. 1.1.
[20] *See* Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 72, WTO Doc. WT/DS257/AB/R (adopted Feb. 17, 2004) [hereinafter *United States — Softwood Lumber IV* Appellate Body Report].
[21] *See* Panel Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, ¶¶ 7.1036-37, WTO Doc. WT/DS316/R (adopted June 1, 2011). (In the Report, the Panel developed an interpretation of "general infrastructure").

> with the ordinary meaning of the term "general" when used to modify the word "infrastructure". However, we consider that it is difficult if not impossible to define the concept of "general infrastructure" in the abstract.[22]

The panel thus opined that the term "general infrastructure" means the economic foundation of a country that is provided to all or nearly all entities of the country. Power stations, sewers, roads, and housing were presented as examples. The panel further stated:

> For us, the existence of limitations on access to or use of infrastructure, whether *de jure* or *de facto*, is highly relevant in determining whether that infrastructure is "general infrastructure". However, we are not persuaded by the . . . argument that [this] is the only legally relevant consideration, and one that will always be determinative . . . . [W]e see no reason why other considerations concerning the provision of the infrastructure in question should be categorically excluded from the analysis. In our view, such additional factors could include, inter alia, the circumstances under which the infrastructure in question was created and the nature and type of infrastructure in question.[23]

In determining whether an infrastructure is a general infrastructure, the panel explained that limitations on access to or use of the infrastructure in question are relevant but not determinative. Rather, the totality of circumstances surrounding the infrastructure should be taken into account, such as the creation, nature and type of the infrastructure at issue.

The gist of the panel's analysis in this regard was upheld by the Appellate Body. The Appellate Body, however, found fault with the panel in that the latter focused on the "creation" rather than "provision" of the infrastructure. Thus, in *EC and Certain Member States — Large Civil Aircraft,* the Appellate Body determined that the panel erred in its interpretation and application of Article 1.1(a)(1)(iii) by failing to recognize that the relevant transaction for purposes of its analysis under the provision was the "provision" of goods or services in the form of infrastructure to Airbus, not the "creation" of that infrastructure.[24] The Appellate Body began by noting that the ordinary meaning of the verb "provide" appearing in the article is to "[s]upply or furnish for use; make available".[25] The Appellate Body

[22] *See id.* ¶ 7.1036.
[23] *See id.* ¶ 7.1037.
[24] *See* Appellate Body Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, ¶ 961, WTO Doc. WT/DS316/AB/R (adopted June 1, 2011).
[25] *See id.* ¶ 963.

臺大學術期刊資料庫

confirmed that "when a good or service has not been provided by a government [even if it has somehow been created by the government], there cannot be a financial contribution cognizable under Article 1.1(a)(1)(iii)".[26] The interpretation of the Appellate Body is indeed accurate as the term used in the article is "provide" instead of 'create'. The creation of an infrastructure cannot be equated with the provision of the infrastructure so created. However, the Appellate Body noted the close connection between the two processes. What is to be provided first needs to be created. Thus, the creation still offers an important context for the forthcoming provision. The Appellate Body thus opined:

> While government action concerning the creation of a good or service may not be relevant if that good or service is not ultimately provided to a recipient, we do not understand on what basis such actions would necessarily be excluded in assessing what has been provided. Recalling the meaning of the term "provide" set out above—supply or furnish for use; make available—we consider that *this term permits taking into account what was involved in supplying or furnishing that infrastructure*. *The creation of infrastructure is a precondition, and thus necessary, for the provision of that infrastructure*. We therefore do *not view the use of the term "provision" in Article 1.1(a)(1)(iii) as excluding the possibility that circumstances of the creation of infrastructure* may be relevant to a proper characterization of what it is that is provided.[27] (emphasis added)

In other words, the creation part of an infrastructure still constitutes a relevant portion of the analysis of a "general infrastructure". How an infrastructure is created and how it is provided are both to be taken into account, though with varying degrees, in the totality of circumstances test.

As regards the term "provide" or "provision", the WTO panel in the *United States — Large Civil Aircraft (2nd complaint) (Article 21.5 — European Union)* provides further guidance. After rejecting the European Union (hereinafter "EU")'s argument that intellectual property rights may be considered "goods" under Article 1.1(a)(1)(iii), the panel nonetheless addressed the EU's argument that the United States "provides" such intellectual property (as goods) through the challenged transactions at issue. In the dispute, the EU specifically argued that the United States "provides" Boeing with patents and other rights (which were argued as goods by the EU) on the grounds that "U.S. laws and regulations generally provide

臺大學術期刊資料庫

[26] *See id.* ¶ 964.
[27] *See id.* ¶ 965.

contractors with the right to receive title to inventions that arise from a funding agreement with the U.S. government".[28] Accordingly, the panel observed that the EU's argument seemed to be that "where a law lays down the conditions under which rights to title to inventions can be obtained, the government thereby 'provides' these rights within the meaning of Article 1.1(a)(1)(iii)."[29] The panel decided that this is not the correct reading of the term "provide". According to the panel, "provide" is for a government to take a specific action of giving something for enjoyment to a recipient. Introducing a law or maintaining a social system in which transactions merely takes place in and of themselves does not constitute "provide". For its decision, the panel referred to the statements of the Appellate Body in the *United States — Softwood Lumber IV* where it opined:

The Appellate Body has observed that the term "provide" has been defined as "supply or furnish for use; make available" and "to put at the disposal of".[30]

> The Appellate Body has also explained that there must be a "reasonably proximate relationship" between the governmental action of providing the good or service and the use or enjoyment of the good or service by the recipient. It stated that "a government must have some control over the availability of a specific thing being 'made available'". The European Union does not explain how its interpretation of "provide" can encompass situations where a law merely defines the conditions under which a "right to take title" can be acquired in the future, in the event that a patentable invention, yet to exist, is subsequently developed, and in particular does not explain how its reading is consistent with these Appellate Body pronouncements.[31]

As such, "provide" requires specific action taken by a government expecting enjoyment by a recipient within the country. Then, to "provide general infrastructure" would mean a government's creation, establishment and presentation of key social facilities for the enjoyment of the general public of the country.

As regards the term "provide goods or services", the panel in the *United States — Large Civil Aircraft (2nd complaint) (Article 21.5 — EU)* observed

---

[28] *See* Panel Report, *United States — Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 8.388, WTO Doc. WT/DS353/RW (adopted Apr. 11, 2019) [hereinafter *US — Large Civil Aircraft (2nd complaint) (Article 21.5—EU)* Panel Report].

[29] *See id.* ¶ 8.389.

[30] *See United States — Softwood Lumber IV* Appellate Body Report, *supra* note 20, ¶ 69.

[31] *See US — Large Civil Aircraft (2nd complaint) (Article 21.5—EU)* Panel Report, *supra* note 28, ¶ 8.389.

臺大學術期刊資料庫

that it is distinct from providing grants or loans to a private entity to help it purchase necessary goods or services. It should be to provide "goods or services" to the private entity. Thus, the panel basically rejected the EU's argument that, where a government makes a financial contribution for the purpose of supporting a firm's financing of the construction or purchase of a good, the financial contribution must be treated as a provision of that good in the sense of Article 1.1(a)(1)(iii). The panel explained:

> We consider that this logic [of the EU] is inconsistent with Article 1.1(a)(1), which clearly contemplates a characterization of a measure as a financial contribution *on the basis of the manner in which that measure transfers value to a recipient*. Therefore, even where they are somehow related to the purchase of goods or services by a recipient, grants, loans, and tax measures are distinctive types of financial contributions. The term "provide goods or services other than general infrastructure" cannot be interpreted so broadly as to include measures that fall naturally within the scope of the other types of financial contribution identified in Article 1.1(a)(1).[32] (emphasis added)

As the panel correctly observed, the fact that Article 1.1(a)(1) of the SCM Agreement stipulates four separate categories of financial contribution indicates that they all constitute distinct modes of providing financial contribution. Just because underlying transactions are somehow related, one may not change the nature of one particular form of financial contribution into that of another. In short, a government's provision of money or tax credits to a private entity for the purchase of goods or services or for the construction of infrastructure cannot be a "provision of goods or services other than general infrastructure" under Article 1.1(a)(1)(iii). Instead, it should be regarded as grants under Article 1.1(a)(1)(i) or tax exemption under Article 1.1(a)(1)(ii) respectively. Stated differently, the "provision of general infrastructure" which is exempted from the "provision of goods or services" by the government as a form of financial contribution means the situation where the government itself creates, establishes and presents a social infrastructure for enjoyment by the general public. It is a situation where no financial contribution exists, hence no subsidy under the SCM Agreement.

Mindful of Article 1.1(a)(1)(iii) of the SCM Agreement and the jurisprudence interpreting it, then government projects for the purpose of providing general infrastructure may not constitute "fisheries subsidies"

臺大學術期刊資料庫

[32] *See id.* ¶ 8.809.

within the meaning of Article 1 of the FSA either.[33] It would probably lead to the exclusion from the scope of fisheries subsidies of those subsidies provided to the construction or maintenance of ports, harbors, piers, docks, safety facilities, repair facilities, or vessel fuel stations in or near coastal towns. According to the definition of general infrastructure discussed by panels and the Appellate Body above, it usually covers hardware facilities but may also expand to software systems as long as they involve a government's own projects to establish social infrastructure destined for the utilization and enjoyment by the general public. For instance, social welfare programs, income support measures for the underprivileged class, or information and communication technology (ICT) networking projects may well constitute the "software" general infrastructure of a country.

These general infrastructure examples mentioned above may well be taken advantage of or utilized by those engaged in fishing activities, in particular those engaged in now prohibited fishing activities under the FSA. Under the current scheme of the FSA, even if the subsidies in the form of general infrastructure are provided to IUU fishing or overfished stock fishing, they stay outside of the FSA regulation as they do not constitute a subsidy from the start under Article 1 of the FSA.

What are permissible general infrastructure projects and what is not in the context of fisheries subsidies were discussed at length during previous negotiations.[34] These discussions are apparently not reflected in the current FSA. Nor does the FSA state how the general infrastructure exceptions of the SCM Agreement would play a role in its operation.

Given that some of these general infrastructure examples were fisheries subsidies programs having been discussed as main targets of the fisheries subsidies regulation during negotiation, it is not entirely clear whether the open-ended carve-out of general infrastructure as it is now was the intention of the Members when they agreed on the text of the FSA in June 2022: under the current scheme, general infrastructure projects, even if they are in bad faith, harmful to overfished fish stocks, or supportive of IUU fishing, cannot be regulated by the new FSA. Of course, this exception does not cover all infrastructure; rather it only covers *general* infrastructure with specific

---

[33] *See* FSA, *supra* note 1, art. 1.

[34] *See* Negotiating Group on Rules, *Contribution to the Discussion on the Framework for the Disciplines on the Fisheries Subsidies*, ¶ 11, TN/RL/W/172 (Feb. 22, 2005); Negotiating Group on Rules, *Communication from the Republic of Korea, Fisheries Subsidies – Articles III, V, and X*, ¶ 14, TN/RL/GEN/178 (Mar. 10, 2011). Some delegations only mention infrastructure subsidies, such as those for the improvement in physical port facilities exclusively or predominantly for activities related to marine wild capture fishing related to the livelihood of fishers and their families, and in compliance with Food and Agriculture Organization of the United Nations [hereinafter FAO] Code of Conduct to "developing" countries; *see* Negotiating Group on Rules, *Communication from Argentina, Chile, Egypt and Uruguay,* Fisheries Subsidies: Special and Differential Treatment, ¶ 7, TN/RL/GEN/173/Rev.1 (Jan. 26, 2011); Negotiation Group on Rules, *Communication from the Chairman*, ¶ 66, TN/RL/W/254 (Apr. 21, 2011).

conditions attached. Even with a qualifying word, however, it seems possible that some fisheries projects of some Members may well fall under the exception with some advance planning in an effort to circumvent the obligations under the FSA. Further elaboration needs to be achieved on this issue as soon as possible.

In this regard, it should also be noted that the provisions of the FSA are broad in scope. The FSA aims to target *any* subsidy granted to IUU fishing[35] and overfished stocks.[36] This stringent regulation scheme would arguably imply that if a subsidy provided to the IUU fishing and overfished stock is somehow engineered or facilitated by the general infrastructure of various sorts, or provided through the general infrastructure, controversies will follow inevitably considering equally important carve-out of general infrastructure. Thus, there seems to be a structural fissure between the FSA and the SCM Agreement in this regard: that is, the scheme of the FSA to cover targeted subsidies as widely as possible vs. the scheme of the SCM Agreement to exclude a particular type of subsidy which may well be utilized as a vehicle for a fisheries subsidy. Whether the general infrastructure exception still applies to the fisheries subsidies and if so, what the exception's exact contours need to be clarified sooner rather than later for the effective implementation of the FSA.

If the Members' intention is indeed to introduce stringent subsidy norms to prohibit any subsidy that may harm overfished stocks or that may support IUU fishing, it would have to be stipulated explicitly in the text of the FSA. In other words, to avoid any confusion in the future and to achieve the objectives of the FSA without undue delay, it would be advisable for the FSA to diverge from the SCM Agreement on this point and thus include at least some general infrastructures in fisheries subsidies from a policy perspective.

B. Amorphous Nature of a Subsidy Program

Article 3 of the SCM Agreement *prohibits* some subsidy programs *ex ante* because of their conspicuously harmful effect.[37] The following two

---

[35] Article 3.1 of the FSA provides:

> No Member shall grant or maintain any subsidy to a vessel or operator (FN 5) engaged in illegal, unreported and unregulated (IUU) fishing or fishing related activities in support of IUU fishing.
>
> *(FN 5)* For the purpose of Article 3, the term "operator" means the operator within the meaning of Article 2(e) at the time of the IUU fishing infraction. For greater certainty, the prohibition on granting or maintaining subsidies to operators engaged in IUU fishing applies to subsidies provided to fishing and fishing related activities at sea.

[36] In this regard, Article 4.1 of the FSA provides: "No Member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock."

[37] *See* SCM Agreement, *supra* note 7, Article 3.1; Peggy A. Clarke & Gary N. Horlick, *The*

types of subsidies fall into this "prohibited subsidy" category.[38]

> Article 3 of the SCM Agreement: Prohibition
>
> 3.1 [T]he following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;
>
> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.
>
> 3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1. (footnotes omitted)

Thus, according to Article 3 of the SCM Agreement, two types of subsidies—export subsidies and import substitution subsidies—are prohibited. Such subsidies are either subject to expedited dispute settlement proceedings under Article 4 of the SCM Agreement or countervailable duties after investigations by investigating authorities of importing Members.

In the *United States — Tax Incentives*, the Appellate Body elaborated on the role of Article 3 of the SCM Agreement. It clarified that the "granting of subsidies is not, in and of itself, prohibited under the SCM Agreement; nor does the granting of subsidies constitute, without more, an inconsistency with that Agreement".[39] The Appellate Body further opined:

> Only subsidies contingent upon export performance within the meaning of Article 3.1(a) (commonly referred to as export subsidies), or contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) (commonly referred to as import substitution subsidies), are prohibited per se under Article 3 of the SCM Agreement. In any event, subsidies, if specific, are disciplined under Part III of the SCM Agreement, but a complaining Member must demonstrate the existence of adverse effects under Article 5 of that Agreement.[40]

What is prohibited under the SCM Agreement are not subsidies generally but certain specific subsidies that satisfy two sets of specific

---

Agreement on Subsidies and Countervailing Measures, *in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 679, 696-99 (Patrick F. J. Macrory et al. eds., 2005).

[38] *See id.*

[39] *See* Appellate Body Report, *United States — Conditional Tax Incentives for Large Civil Aircraft*, ¶ 5.6, WTO Doc. WT/DS487/AB/R (circulated Sept. 4, 2017). Referring to Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft Recourse by Brazil to Article 21.5 of the DSU*, ¶ 47, WTO Doc. WT/DS70/AB/RW (adopted Aug. 4, 2000).

[40] *See id.* ¶ 5.6.

requirements. Notably, Members can tell *in advance* whether a specific subsidy in question is a prohibited one—for instance by evaluating the export contingency or the domestic contents contingency. Regarding the interpretation of the term "contingent . . . in fact" in Article 3.1(a) of the SCM Agreement, the WTO panel in *Australia — Automotive Leather II* established a standard of "close connection" between the grant or maintenance of a subsidy and a recipient's export performance. It added that a subsidy, in order to be export contingent in fact, must be "conditioned" upon export performance:

> An inquiry into the meaning of the term "contingent . . . in fact" in Article 3.1(a) of the SCM Agreement must, therefore, begin with an examination of the ordinary meaning of the word "contingent". . . . [T]he text of Article 3.1(a) also includes footnote 4, which states that the standard of 'in fact' contingency is met if the facts demonstrate that the subsidy is "in fact tied to actual or anticipated exportation or export earnings". . . . Both of the terms used—"contingent . . . in fact" and "in fact tied to"—suggest an interpretation that requires *a close connection between the grant or maintenance of a subsidy and export performance*.[41] (emphasis added)

With respect to "contingent in fact", which is usually more complex and controversial than "contingent in law", one should confirm "a close connection between a subsidy and the export performance." Even so, the condition is what exists *prior*—even if the program in question does not contain an expressly stipulated legal condition, it still contains features that in fact create a condition linked to export performance. This understanding is further confirmed by footnote 4 which is attached to Article 3 of the SCM Agreement. It provides:

> This standard is met when the *facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings*. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision. (emphasis added)

The above footnote explains that what is required is the fact of

臺大學術期刊資料庫

[41] *See* Panel Report, *Australia — Subsidies Provided to Producers and Exporters of Automotive Leather*, ¶ 9.55, WTO Doc. WT/DS126/R (adopted June 16, 1999).

demonstrating the "tying" between a subsidy and actual or anticipated export performance even in the absence of legal stipulation in the granting law or regulation. Thus, here also, the subsidy program at issue is designed and formulated, although in an indirect or convoluted way, to be conditioned on export performance. Accordingly, in both cases of contingency in law and contingency in fact, the subsidy program in question was created and is maintained within the purview and control of the granting government.

The WTO panel in *Canada — Aircraft* provides further enlightenment in this regard. The panel examined the "tied to" language of footnote 4. The panel's finding is that the "tied to" requirement also demands "conditionality" between the grant of a subsidy and export performance.[42] The Appellate Body in the dispute agreed with the term "conditioned" and linked it to the concept of a contingency under Article 3.1(a):

> The ordinary meaning of "tied to" confirms the linkage of "contingency" with "conditionality" in Article 3.1(a). . . . This element of the standard set forth in footnote 4, therefore, emphasizes that a relationship of conditionality or dependence must be demonstrated. . . . In any given case, the facts must "demonstrate" that the granting of a subsidy is tied to or contingent upon actual or anticipated exports. It does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result. . . .[43]

In sum, according to the panel and the Appellate Body, the key standard in the "tied to" analysis is also "conditionality." A "conditionality" or "condition" is what is arguably designed and formulated by the granting government *at the time of* the contemplation or introduction of the program in question. It was contemplated or introduced *prior*. Furthermore, the existence of such conditionality or condition should be "demonstrated", not merely suggested or speculated, a requirement which also supports the finding of prior planning.

The Appellate Body *in Canada — Aircraft* largely agreed with the findings of the panel on the interpretation of the term "contingency", but it nevertheless cautioned against the use of the "but for" test established by the panel on the basis of the term "tied to":

> We note that the Panel considered that the most effective means of

[42] *See* Panel Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, ¶ 9.331, WTO Doc. WT/DS70/R (adopted Aug. 20, 1999) [hereinafter *Canada — Aircraft* Panel Report].

[43] *See* Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, ¶ 171, WTO Doc. WT/DS70/AB/R (adopted Aug. 20, 1999) [hereinafter *Canada — Aircraft* Appellate Body Report].

> demonstrating whether a subsidy is contingent in fact upon export performance is to examine whether the subsidy would have been granted but for the anticipated exportation or export earnings . . . . While we consider that the Panel did not err in its overall approach to de facto export contingency, we, and panels as well, must interpret and apply the language actually used in the treaty.[44]

It then provided its own reasoning with respect to the ordinary meaning of the text "contingent . . . in fact . . . on export performance":

> In our view, the key word in Article 3.1(a) is "contingent". As the Panel observed, the ordinary connotation of "contingent" is "conditional" or "dependent for its existence on something else". This common understanding of the word "contingent" is borne out by the text of Article 3.1(a) . . . .[45]
>
> In our view, the legal standard expressed by the word "contingent" is the same for both de jure or de facto contingency. There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent. De jure export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument. Proving de facto export contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is "contingent . . . in fact . . . upon export performance". Instead, [it] . . . must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy . . . .[46] (emphasis added)

The Appellate Body thus held that the legal standard encapsulated by the term "contingent" is the same for both *de jure* and *de facto* contingency, and framed the distinction between these two types of contingencies in terms of the evidence upon which such determination would rest. Thus, in both instances, the basic feature of a subsidy program as designed and formulated in advance determines the "contingency".

The Appellate Body's further examination of other textual language than "tied to" in *Canada — Aircraft* sheds lighter on this analysis:

> We note that satisfaction of the standard for determining *de facto* export contingency set out in footnote 4 requires proof of

臺大學術期刊資料庫

[44] *See id.* ¶ 171, n.102.
[45] *See id.* ¶ 166.
[46] *See id.* ¶ 167.

> three different substantive elements: first, the "granting of a subsidy"; second, "is . . . tied to . . ."; and, third, "actual or anticipated exportation or export earnings" . . . .[47]
>
> The first element of the standard for determining *de facto* export contingency is the "granting of a subsidy". In our view, the initial inquiry must be on whether the granting authority imposed a condition based on export performance in providing the subsidy . . . .[48]
>
> We turn now to the third . . . element . . . The dictionary meaning of the word "anticipated" is "expected". The use of this word, however, does not transform the standard for "contingent . . . in fact" into a standard merely for ascertaining "expectations" of exports on the part of the granting authority . . . This examination is quite separate from, and should not be confused with, the examination of whether a subsidy is "tied to" actual or anticipated exports . . . .[49]

The above discussion of other elements, i.e. "granting of a subsidy", and "anticipated" arguably confirms the point that the subsidy program even in the case of *de facto* contingency requires advance planning on the part of the granting government. The term "granting of a subsidy" demands an examination of "whether the granting authority imposed a condition",[50] and the term "anticipated" demands an inquiry into "expectation of exports on the part of the granting authority".[51] As a matter of fact, the panel in *Canada — Aircraft,* in a statement not specifically addressed by the Appellate Body, also noted that "the nature of the required conditionality [is] that 'one of the conditions for the grant of the subsidy is the expectation that exports will flow thereby'".[52] The panel came to the conclusion that "the facts available demonstrate that one of the conditions of the grant of . . . contributions to the . . . industry is indeed such an expectation, in the form of projected export sales anticipated to 'flow' directly from these contributions."[53] This observation of the panel sheds important light on the current analysis in that it shows the level of specific expectation on the part of the government when it introduces the said subsidy program. Such being the case, as with the term "tied to", the terms "granting of a subsidy" and "anticipated" both indicate

---

[47] *See id.* ¶ 169.
[48] *See id.* ¶ 170. In finding that the knowledge of the recipient is not part of the legal standard of *de facto* export contingency, we do not suggest that relevant objective evidence relating to the recipient can never be considered by a panel.
[49] *See id.* ¶ 172.
[50] *See id.* ¶ 170.
[51] *See id.* ¶ 172.
[52] *See Canada — Aircraft* Panel Report, *supra* note 42, ¶ 9.326.
[53] *See id.* ¶ 9.346.

臺大學術期刊資料庫

that the design and formulation of the program in question are arguably within the purview or control of a granting government.

Finally, as stipulated in Article 4.7 of the SCM Agreement, once a measure is found to be a prohibited subsidy, it must be withdrawn promptly: "If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member *withdraw the subsidy without delay*." (emphasis added)

Under Article 4.7 of the SCM Agreement, termination of the program is the only available option, unlike any other possible rulings and recommendations of panels and the Appellate Body under the DSU.[54] Upon careful reading, this article is structured as follows: (i) "a measure is found to be a prohibited subsidy", and (ii) "the subsidy" so fund must be "withdrawn". As the measure is equated with the subsidy ("a measure is found to be a prohibited subsidy"), what needs to be withdrawn (i.e., subsidy) is ultimately the measure. Put differently, the outcome of the rulings and recommendations of panels and the Appellate Body in this instance is to "terminate" the governmental measure on point. It should be noted that this scheme is directly incorporated into the FSA.[55] It means that any decision on fisheries subsidies would lead to the termination of the governmental measure in question, because the FSA only stipulates prohibited subsidies, and it incorporates Article 4.7 of the SCM Agreement for its own dispute settlement proceedings.

The above discussion on the prohibited subsidies jurisprudence of the SCM Agreement, which is now being incorporated into the FSA, would arguably raise the following structural question. The prohibited subsidy jurisprudence of Articles 3 and 4 of the SCM Agreement is premised on the notion that the subsidy program in question is designed and formulated by the granting government in advance, namely at the time of the contemplation or introduction of the program. Thus, the concept and scheme adopted there is prohibition *ex ante*. In other words, a government that introduces a prohibited subsidy either contingent in law or in fact should be penalized with an extraordinary penalty of prompt withdrawal of the measure because of the violation of which it is aware from the beginning.

The FSA also introduces prohibited subsidies, but it seems that it purports to regulate them *ex post facto*. For instance, a governmental support/assistance program does not pose a problem under the FSA *unless and until* it ends up subsidizing IUU fishing or overfished stock fishing.[56] In other words, a governmental program which does not pose a subsidy problem in the first place becomes a problem afterwards depending on the reaction or

臺大學術期刊資料庫

[54] *See* DSU art. 19.1.
[55] *See* FSA, *supra* note 1, art. 10.2.
[56] *See* FSA, *supra* note 1, arts. 3.1, 4.1.

behavior of the recipient, which oftentimes is beyond the control of the granting government. For example, when a recipient of governmental financial support engages in IUU fishing, without the government's knowledge, the support program becomes a prohibited subsidy only after the recipient has engaged in IUU activities. Similarly, if a recipient of governmental financial support engages in fishing activities for certain overfished stock, without the knowledge of or authorization from the government, the support program then becomes a prohibited subsidy, which will then be subject to the expedited dispute settlement procedure under Article 4 of the SCM Agreement via Article 10.2 of the FSA.

Accordingly, while both the SCM Agreement and the FSA aim to regulate prohibited subsidies, the nature of prohibition in the FSA is different from the nature of prohibition in the SCM Agreement. And yet, the FSA incorporates the prohibited subsidy jurisprudence of the SCM Agreement without any qualification or adjustment.

Arguably, this recipient-controlling scheme of the FSA is not seen in the SCM Agreement. One might submit that the *ex post facto* element of the fisheries subsides under the FSA may not fit well with the *ex ante* design of Articles 3 and 4 of the SCM Agreement.[57] In Articles 3 and 4 of the SCM Agreement, the situation leading to prohibited subsidies is within the purview and control of the granting government. On the contrary, the prohibited subsidy situations envisaged in the FSA are *not* within such a purview or control of the granting government. How to handle this structural fissure between the jurisprudence of the SCM Agreement and the new FSA over essentially the same category of prohibited subsidies seems to be another critical issue. It deserves the careful attention of the Members going forward. In order to avoid confusion and unnecessary controversy in the future, the FSA should preferably state clearly that it deviates from the basic framework of the SCM Agreement on this point. It should be taken up in future discussions with the FSA.

It is true that unlike Article 3 of the SCM Agreement, the FSA does not include the term "contingent" in its prohibited subsidy provisions. This difference notwithstanding, the discussion of the contingency jurisprudence of the SCM Agreement is still relevant in this discussion because the scope of the prohibited subsidies in the FSA is wider than the prohibited subsidies

---

[57] In this regard, Article 10.2 of the FSA provides:

> Without prejudice to paragraph 1, the provisions of Article 4 of the SCM Agreement (Fn18) shall apply to consultations and the settlement of disputes under Articles 3, 4 and 5 of this Agreement.
>
> (Fn 18) For purposes of this Article, the term "prohibited subsidy" in Article 4 of the SCM Agreement refers to subsidies subject to prohibition in Article 3, Article 4 or Article 5 of this Agreement.

臺大學術期刊資料庫

under Article 3 of the SCM: while the former does not have any qualifier, the latter contains the said "contingent" qualifier. As such, the consequence of *ex post facto* regulation as opposed to the original *ex ante* regulation looms even larger in the context of the current FSA scheme. Thus, this difference in terms calls for prompt clarification with an even stronger voice.

C. Reversed Benefit Assessment

Another structural issue that deserves careful attention is the "benefit" calculation scheme under the FSA. The FSA declares that its subsidy analysis is based on the benefit calculation formula of the SCM Agreement.[58] A longstanding WTO jurisprudence on benefit is that the correct question to be asked in this respect is not about the cost to the provider (government) but the benefit to the recipient (exporter/business).[59] In *United States — Countervailing Measures on Certain EC Products*,[60] the Appellate Body thus held:

> In *Canada — Aircraft*, we were asked whether the "cost to government" was relevant to the interpretation of "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. In finding the "cost to government" not to be the relevant benchmark for identifying the "benefit", we said that Article 14 of the SCM Agreement prescribes the guidelines required to "calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1". . . . We concluded that this phrase in Article 14 necessarily provides relevant context for interpreting Article 1.1, and we found that:
>
> > [a] "benefit" does not exist in the abstract but must be received and enjoyed by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term "benefit", therefore, implies that there must be a recipient . . . .[61]

In *Canada — Aircraft*, Canada argued that a financial contribution only

---

[58] *See* FSA, *supra* note 1, art. 1.
[59] *See* SCM Agreement arts. 1.1, 14.
[60] *See* Appellate Body Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, ¶¶ 108, 110, WTO Doc. WT/DS212/AB/R (adopted Jan. 8, 2003) [hereinafter *US — Countervailing Measures on Certain EC Products* Appellate Body Report].
[61] *See id.* ¶ 108.

臺大學術期刊資料庫

conferred "benefit" on the recipient to the extent that it resulted in a net cost to the government. The panel rejected Canada's argument, finding that the ordinary meaning of "benefit" does not include any notion of net "cost to the government".[62] According to the Panel, the ordinary meaning of "benefit" instead "clearly encompasses some form of advantage."[63] To establish the existence of that advantage, the panel found that "it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution."[64] This finding of the panel was basically upheld by the Appellate Body:

> A "benefit" does not exist in the abstract but must be received and enjoyed by a beneficiary or a recipient. . . . [T]he focus of the inquiry under Article 1.1(b) of the SCM Agreement should be on the recipient and not on the granting authority. The ordinary meaning of the word "confer", as used in Article 1.1(b), bears this out. "Confer" means, inter alia, "give", "grant" or "bestow". The use of the past participle "conferred" in the passive form, in conjunction with the word "thereby", naturally calls for an inquiry into what was conferred on the recipient. Accordingly, we believe that Canada's argument that "cost to government" is one way of conceiving of "benefit" is at odds with the ordinary meaning of Article 1.1(b), which focuses on the recipient and not on the government providing the "financial contribution".[65]

Furthermore, the WTO panel in the *United States — Carbon Steel (India)* explained the comparative analysis to determine whether remuneration is "less than adequate" under Article 14(d) of the SCM Agreement as follows:

> [T]he comparative analysis envisaged by Article 14(d) concerns the question of whether the remuneration is "less than" adequate. The phrase "less than" is comparative in nature, requiring a comparison between the government price and a price that is representative of adequate remuneration in the market, as determined in relation to the prevailing market conditions. . . .[66]

---

[62] *See*, *Canada — Aircraft* Panel Report*, supra* note 42, ¶ 9.112.
[63] *See id.*
[64] *See id.*
[65] *See Canada — Aircraft* Appellate Body Report, *supra* note 43, ¶ 154.
[66] *See* Panel Report, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 7.32, WTO Doc. WT/DS436/R (adopted Dec. 19, 2014). The comparative analysis required by Article 14(d) is similar to that required by Article 14(a) which, while not using the term "difference", nevertheless requires a comparison of the "investment decision"

Thus, according to the panel, in calculating benefits under Article 14 (d) of the SCM Agreement, the key criterion is a comparative analysis between the government price and the market price. This finding was upheld by the Appellate Body which stated:

> [A] determination of whether remuneration is "less than adequate" within the meaning of Article 14(d) involves the selection of a comparator—i.e. a benchmark price—with which to compare the government price for the goods in question. If the result of this comparison is that the government price is less than the benchmark price, the difference between the two prices reflects the benefit conferred under Article 14(d).[67]

In doing so, the Appellate Body rejected India's argument that under Article 14(d) an investigating authority must, as a threshold matter, address the adequacy of remuneration prior to an examination of benefit.[68] The Appellate Body stated:

> [W]e consider that Article 14(d) of the SCM Agreement establishes the adequacy of remuneration as the lens through which "benefit", within the meaning of that provision, must be assessed. Thus, Article 14(d) prescribes a unitary assessment in which a determination of benefit is reached through an analysis of the adequacy of remuneration for government-provided goods. Accordingly, we consider that, contrary to India's assertions, separate analyses of "benefit" and "remuneration" are not required under Article 14(d) of the SCM Agreement.[69]

The Appellate Body basically confirmed that there is no standard or formula in absolute terms to calculate benefit, and that there instead can be only a comparative analysis between a subsidy-assisted entity and a market benchmark. The comparative analysis as such can only be done through an examination of the situation of a subsidy recipient vis-à-vis the transaction standard from a relevant market. This point was further underscored by the Appellate Body which opined that "the adequacy of remuneration is to be assessed from the perspective of the recipient, rather than the government

---

with "usual investment practice".

[67] *See* Appellate Body Report, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 4.148, WTO Doc. WT/DS436/AB/R (adopted Dec. 19, 2014).

[68] *See id.* ¶ 4.117.

[69] *See id.* ¶ 4.126.

臺大學術期刊資料庫

provider of the good in question." In fact, the title of Article 14(d) ("Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient") also provided helpful context to the Appellate Body's such observation. The Appellate Body thus concluded that "[a]lthough the concept of 'remuneration' reflects a payment for goods or services that could be viewed from the perspective of either the person providing or receiving the payment, other interpretative elements lead us to consider that *this assessment must properly be conducted from the perspective of the recipient*."[70]

Contrary to the clear jurisprudence of panels and the Appellate Body on this issue, however, presumably the benefit assessment in the FSA is set to place its focus on the cost to the government agency in charge—i.e., the governmental funding or budget for the operation of a program for the benefit of fishermen or fishing activities.[71] It does not necessarily examine how much benefit the *recipient* has enjoyed from the program.[72]

It appears that this is an inevitable outcome of the "behavior-focused" approach of the FSA. The FSA examines the nature of the *conduct* of fishermen or operators to see if they have engaged in the two targeted activities—i.e., IUU fishing or fishing for overfished stocks. Notably, this scheme does not necessarily examine whether the subsidy-receiving fishermen have become *better off* as a result of the subsidy at issue—the core question of the benefit assessment under the SCM Agreement.[73] Rather, the key inquiry under the FSA seems to be whether the recipient fishermen have engaged in a particular type of activity regardless of whether they are better or worse off than before. A benefit calculation in this instance then would

---

[70] *See id.* ¶ 4.128 (emphasis added).
[71] *See* SCM Agreement art. 14.
[72] *See* SCM Agreement art. 1.1.
[73] *See* SCM Agreement art. 1.1(b): Extinction of the benefit; *US — Countervailing Measures on Certain EC Products* Appellate Body Report, *supra* note 60, ¶ 102:

> We agree with the United States that, irrespective of the price paid by the new private owner, privatization does not remove the equipment that a state-owned enterprise may have acquired (or received) with a financial contribution and that, consequently, the same firm may "continue[] to make the same products on the same equipment". However, this observation serves only to illustrate that, following privatization, the utility value of equipment acquired as a result of a financial contribution is not extinguished, because it is transferred to the newly-privatized firm. But, the utility value of such equipment to the newly-privatized firm is legally irrelevant for purposes of determining the continued existence of a "benefit" under the SCM Agreement. As we found in Canada — Aircraft [Appellate Body Report, ¶ 157], the value of the "benefit" under the SCM Agreement is to be assessed using the marketplace as the basis for comparison. It follows, therefore, that once a fair market price is paid for the equipment, its market value is redeemed, regardless of the utility the firm may derive from the equipment. Accordingly, it is the market value of the equipment that is the focal point of analysis, and not the equipment's utility value to the privatized firm.

likely be an assessment of the governmental budget spending record, or how much money or goods has changed hands from government agencies to fishermen as opposed to what benefits the fishermen have in fact derived from the governmental funding so provided. An argument could be made that this constitutes a "reversed" benefit analysis distinct from the prevailing jurisprudence of the SCM Agreement. This might raise another structural issue between the FSA and the SCM Agreement.

Here again, the FSA stipulates in Article 1 that it incorporates the subsidy definition of the SCM Agreement. As such being the case, one might think that all the existing "benefit" jurisprudence, a core component of the subsidy definition, is also incorporated into the discussion of fisheries subsidies. Regardless of the simple statement in Article 1, however, the basic design and structure of the FSA are arguably not able to implement this particular jurisprudence of benefit in the operation and administration of the FSA. Future FSA discussions should address this issue to clarify the exact meaning of benefit analysis in the specific context of fisheries subsidies. If Members' intention to depart from the jurisprudence of the SCM Agreement is confirmed for the purpose of stronger regulation of fisheries subsidies, it should preferably be expressed in the text of the FSA in the future.

As the FSA incorporates the basic structure of the SCM Agreement for its operation and interpretation,[74] it may be preferable and even important that the two agreements are aligned and dovetailed. It is not clear how Members understand these structural fissures at this point. Nor is it certain how future panels and the Appellate Body would react to these issues when they confront them in prospective proceedings involving the FSA. As the FSA imports, without any qualification or adjustment, the core elements and schemes of the SCM Agreement, one would (or should) assume that the existing jurisprudence of the SCM Agreement has been incorporated without any qualification or adjustment as well. There are, however, several structural mismatches between the two agreements as illustrated by the three outstanding examples above.

IV. FUTURE COURSE OF ACTION

When addressing various outstanding issues of the FSA, perfect should not be the enemy of good. It is worth remembering that the FSA is the outcome of a novel attempt spanning over almost two decades. It aims to address environmental issues rather than economic or trade issues *per se*. As such, a plausible argument could be made that existing jurisprudence of the WTO Agreements should not be adopted directly or without adjustment. As they say, new wine demands new bottles. Some mismatches and

臺大學術期刊資料庫

[74] *See generally* Section III of this article.

uncertainties, therefore, may be natural or even inevitable.

That said, however, as a legal instrument the new agreement needs to be analyzed from a rigorous legal perspective for longer-term success and sustainability. The unique aspect of the FSA is that it pronounces its acceptance of the core elements of the subsidy norms of the existing WTO Agreements, namely, the SCM Agreement. In particular, the SCM Agreement has developed its jurisprudence on financial contribution and benefit, the two core elements of a subsidy, through various disputes over the past twenty-nine years. Now, the subsidy jurisprudence so evolved stands to be applied to the FSA.

The dichotomy between the new norm and the existing jurisprudence as discussed in the previous section arguably raises a structural schism between the general objectives of the FSA and the legal underpinnings on which it stands (i.e., the SCM Agreement). This article has purported to identify select prominent challenges that Members would have to confront in the early stage of the FSA implementation.

In the MC-12 Ministerial Decision, the Members committed to ongoing negotiations to address remaining issues and to improving the disciplines of the agreement, aiming to propose additional provisions by the 13th Ministerial Conference (hereinafter "MC-13").[75] Accordingly, the WTO Members have been holding rounds of "Fish Weeks" in 2023 so as to achieve the goal before the MC-13 in February 2024. After the seventh Fish Week of the year (November 6-10, 2023), WTO Director-General Ngozi Okonjo-Iweala and Ambassador Einar Gunnarsson of Iceland, who chairs the fisheries subsidies negotiations, urged Members to find common ground before the end of the year, while also reminding the Members to formally accept the FSA for its earlier entry into force and implementation. The Director-General conveyed her sense of urgency:

> To be able to conclude in December [2023], you need to start reaching convergence on key issues in the coming days. You know that your senior officials sent signals of members' commitment to conclude, that's what we are looking for. It is time for us now to turn those commitments and the political will into fact.[76]

While the current FSA resolved many complex and sensitive matters for the first time, the text still poses important questions and presents remaining issues that require solid and robust negotiations. This second wave of talks

[75] *See* TWELFTH WTO MINISTERIAL CONFERENCE, https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm (last visited Feb. 18, 2024).

[76] *See DG (Director-General) and Fisheries Subsidies Chair Urge Members to Bridge Differences before Year-End*, WTO (Nov. 10, 2023), https://www.wto.org/english/news_e/news23_e/fish_10nov23_e.htm.

期刊資料庫

should be completed as soon as possible in order to adopt comprehensive norms for remaining issues and to provide further guidance for the already adopted norms.[77] It should be noted that the FSA sets a maximum of a four-year time frame from its entry into force for the completion of these negotiations.[78] Mindful of this tight deadline, the Members may consider the following options during this crucial period.

A. Healthy Debates, Not Undermining the Momentum

First, the Members should not address these legal issues as an existential or fundamental question for the new agreement. As explained earlier, the FSA marks an important step forward for environmental sustainability, and it has taken years of lengthy negotiations to come this far. Regulating fisheries subsidies holds important implications, and the need for an international agreement on this particular topic has been called for by numerous stakeholders so far. For instance, in 1992 a report from the Food and Agriculture Organization of the United Nations (hereinafter "FAO") highlighted the extensive use of subsidies in the fisheries industry and pointed out that eliminating these subsidies could be compensated for by significantly boosting income through better fish stock management.[79] In 1998, the World Bank observed that the subsidies intended to support income in the fisheries sector were actually eroding the effectiveness of fisheries management systems.[80] Then came an almost two-decade-long period of negotiations to regulate fisheries subsidies at the WTO, which then finally led to the conclusion of the FSA in June 2022.

Although imperfect, the FSA is a significant achievement not only for the WTO but also for the entire global community. For example, the United Nations has praised the FSA as a significant milestone in sustainable development discussions within regional and multilateral trading systems to promote sustainable growth and combat harmful fisheries subsidies.[81] The FSA is expected to play a crucial role in preserving oceans, reversing the decline in fish stocks, and supporting SDG 14, particularly target 14.6.[82] The Organisation for Economic Co-operation and Development (hereinafter "OECD"), too, underscores the importance of regulating fisheries subsidies

---

[77] *See WTO Members Advance Fisheries Subsidies Negotiations at Second Fish Week,* WTO (Apr. 28, 2023), https://www.wto.org/english/news_e/news23_e/fish_28apr23_e.htm.
[78] *See* FSA, *supra* note 1, art. 12.
[79] *See* FAO, Marine Fisheries and the Law of the Sea: A Decade of Change, at 66, FAO Doc. FIDI/C853 (Nov., 1993).
[80] *See* Milazzo Matteo, *Subsidies in World Fisheries: A Reexamination* 78-81 (World Bank's Fisheries Series, Technical Paper No. 406, 1998).
[81] *See* U.N., FINANCING FOR SUSTAINABLE DEVELOPMENT REPORT 2023: INTER-AGENCY TASK FORCE ON FINANCING FOR DEVELOPMENT, at 112, U.N. Sales No. E.23.I.6 (2023).
[82] *See id.*

臺大學術期刊資料庫

for sustainable growth and called on governments to accept the FSA.[83] Moreover, the FSA has also established a fisheries funding mechanism to help Members meet new legal obligations.[84] During the 35th Session of the Committee on Fisheries (COFI) held from September 5 to 9, 2022, the FAO acknowledged the importance of the FSA, with an emphasis on FAO's vital role in providing technical support to both the WTO Secretariat and its Members for their effective implementation of the FSA.[85] Thus, a new regime on fisheries subsidies regulation will involve close collaboration among the WTO, FAO, World Bank, and OECD to pool expertise, provide technical assistance, and exchange data and information on fisheries.[86] Thus, the FSA in fact stands for a global endeavor going beyond the WTO.

Given the long history of the global fisheries subsidies discussion spanning over three decades and a variety of international organizations and fora involved so far, it would be a great loss for the international community to let the FSA crumble. It is natural that a novel attempt with new objectives entails some confusion over and mismatch with an existing legal scheme. Therefore, instead of trying to undermine the achievements so far or derail the current efforts, the Members should continue the negotiation of the remaining issues of fisheries subsidies. In other words, future debates and inquiries should try to put the FSA on a stronger legal foothold rather than start from scratch. In light of this, future debates on these structural issues identified in this article should be a healthy one for the long-term success of the FSA. They should not be turned into an occasion for stifling crucial momentum.

B. Fine-Tuning and Elaboration

Once the new agreement enters into force, the Members will be able to accumulate new jurisprudence tailored to fisheries subsidies under the FSA within the general confinement of the SCM Agreement and subsidy jurisprudence. Over time, the new fisheries subsidies jurisprudence will be able to solve many of the problems. In addition, if and when the SCM Agreement itself is amended, which is another topic on the agenda of the WTO reform debates being underway at the moment, some of the outstanding issues (e.g., financial contribution and benefit) may be addressed in the new SCM Agreement in a way that caters to the actual circumstances of government policies and business realities. Such changes will then affect the FSA positively because of the agreement's close interlinkage with the

[83] ORG. FOR ECON. CO-OPERATION & DEV., OECD REVIEW OF FISHERIES 2022 15 (2022).
[84] *See id.*
[85] *See* FAO, *Verbatim Records of Plenary Meetings of the Council*, at 179, FAO Doc. CL 171/PV (Dec. 9, 2022).
[86] *See id.*

臺大學術期刊資料庫

SCM Agreement. The relationship between the SCM Agreement and the FSA may also be taken up in the new SCM Agreement with more elaborated and sophisticated wording.

If an amendment of the SCM Agreement is not feasible, interpretation by the Members under Article IX of the *Marrakesh Agreement Establishing the World Trade Organization* (hereinafter "Marrakesh Agreement")[87] can offer an alternative route. Similarly, although not in the level of official interpretation under Article IX of the Marrakesh Agreement, the Members may also agree to adopt a Ministerial Declaration for the administration and application of the FSA, wherein the Members can jointly declare (i) their awareness of these structural issues, (ii) their understanding of the interpretation and application of the FSA in line with the SCM Agreement, (iii) specific guidelines for such compliant interpretation and harmonious application, and (iv) urging prompt negotiation to address these structural gaps between the FSA and the SCM Agreement so as to produce a clear textual basis to be incorporated in the FSA. A new interpretation under Article IX of the Marrakesh Agreement will bind future panels and the Appellate Body reviewing the FSA-related disputes. A new ministerial declaration, even if not under the interpretation of Article IX, may still offer important interpretive guidelines for future disputes in accordance with Article 31 (3) of the *Vienna Convention on the Law of Treaties* (VCLT).[88]

Likewise, in the course of the subsequent negotiations currently underway, the Members may agree to identify and address these structural issues and provide a new textual basis when the subsequent negotiations are completed in accordance with Article 12 of the FSA. The second wave of negotiations should focus on the remaining issues of fisheries subsidies such as subsidies for over-capacity and overfishing. At the same time, preferably it should also deal with structural issues from the overall architecture of the WTO Agreements.

C. FSA's Entry into Force Critical

Apparently, the most important task at the moment is to bring the FSA

---

[87] *See* Marrakesh Agreement Establishing the World Trade Organization, art. IX, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement].

[88] Article 31 (3) of the Vienna Convention on the Law of Treaties (VCLT) provides:

> There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

臺大農經期刊資料庫

into effect as soon as possible. Once the FSA becomes effective, the Members would have to encounter these issues upfront and contemplate the legal issues more practically and directly. Otherwise, these discussions may remain distant at an abstract and theoretical level. The fine-tuning and elaboration of the FSA would depend on the accumulation of the practice of the Members, through both exemplary implementation and trial and error, which could only come after the agreement is put into effect. As such, it is critical that the FSA become effective as soon as possible for fine-tuning and elaboration of key provisions of the FSA in a meaningful manner and scale.

Director-General Ngozi Okonjo-Iweala commented on the ongoing fisheries subsidies negotiation as follows:

> It is good to negotiate an agreement but getting it to enter into force is even better and for the Fisheries Subsidies Agreement where we are saying that our oceans are fifty percent over-fished, there is an urgency for us to ratify the Agreement and we cannot waste time in ratification because the longer we wait, the more over-fishing there is . . . So far, we have 43 members who have ratified and we need about 110 . . . .[89]

The FSA is not the first covered agreement to be added to the WTO regime. The Members have successfully introduced the *Agreement on Government Procurement* (hereinafter "GPA") after revising it in March 2012. The condition of two-thirds of the parties to the GPA accepting the Protocol of Amendment for the entry into force was met on March 7, 2014. Then, the amended GPA entered into force on April 6, 2014, roughly two years after the adoption.[90] The *Agreement on Trade Facilitation* (TFA)[91] was concluded on December 11, 2013 and it entered into force on February 22, 2017, roughly three years after its adoption.[92]

Likewise, in order to make the FSA effective the Marrakesh Agreement requires two-thirds of WTO Members to submit their "instruments of acceptance" after completing their respective domestic proceedings.[93] To

---

[89] *See WTO Director-General Calls for Ratification of Fisheries Subsidies Agreement*, THE GHANA REPORT (Sept. 22, 2023), https://www.theghanareport.com/wto-director-general-calls-for-ratification-of-fisheries-subsidies-agreement/.

[90] *See* REVISED AGREEMENT ON GOVERNMENT PROCUREMENT, https://www.wto.org/english/tratop_e/gproc_e/gp_revised_gpa_e.htm (last visited Feb. 18, 2024).

[91] *See* General Council, *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, Decision of 27 November 2014*, WTO Doc. WT/L/940 (Nov. 28, 2014), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=128901&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[92] *See* TRADE FACILITATION, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (last visited Feb. 18, 2024).

[93] *See* Marrakesh Agreement, art. X, ¶ 3.

臺大學術期刊資料庫

expedite the agreement's entry into force and subsequent implementation, all Members are urged to promptly initiate and swiftly complete their domestic proceedings, followed by depositing their acceptance instruments with the WTO Depositary. On the part of the WTO Secretariat, more efforts need to be mobilized to expedite the acceptance procedure of the Members, informing them of the importance of early entry into force in terms of both policy and legal perspectives.

D. DSM Restoration Critical

For the materialization of these plans, it is also critical that the WTO dispute settlement mechanism (hereinafter "DSM") regains its full strength. The crisis within the WTO's DSM poses a serious threat to the organization's future.[94] The immediate cause for concern is the paralyzed Appellate Body due to Members' inability to approve new appointments as the terms of existing Appellate Body members expired.[95] Consequently, on December 11, 2019, the Appellate Body essentially became non-functional, as two of its three remaining members concluded their terms, rendering it incapable of handling appeals.[96]

At a meeting of the Dispute Settlement Body (hereinafter "DSB") on March 31, 2023, Marco Molina, Guatemala's Deputy Permanent Representative to the WTO, reported on informal meetings he organized at the request of a group of WTO Members to address the DSM reform.[97] The aim of these meetings was to facilitate substantive discussions for practical solutions, aligning with the June 2022 ministerial mandate for a fully operational and accessible DSM by 2024.[98] Before the DSB meeting, 40-plus bilateral meetings were held in February 2023 involving delegates and regional coordinators from more than 130 WTO Members.[99] The number of new proposals for remaining issues reached as many as 70, and the number of Members participating in small group discussions amounted to as many as 45.[100]

Over thirty Members—some speaking on behalf of multiple Members—commented during the March 2023 DSB meeting.[101] Many expressed support for the ongoing informal process, although questions arose regarding

---

[94] *See* Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body: Insider Perceptions and Members' Revealed Preferences*, 54(5) J. WORLD TRADE 667, 667-98 (2020).
[95] *See id.*
[96] *See id.*
[97] *See Members Briefed on Informal Dispute Settlement Reform Talks*, WTO (Mar. 31, 2023), https://www.wto.org/english/news_e/news23_e/dsb_31mar23_e.htm.
[98] *See id.*
[99] *See id.*
[100] *See id.*
[101] *See id.*

臺大學術期刊資料庫

its nature and inclusivity. Furthermore, discussions on the DSM reform were also active during the G-20 New Delhi Summit on September 9, 2023. The leaders of the G-20 reaffirmed their dedication to engaging in talks aimed at establishing a fully operational and effective WTO DSM by 2024:

We reiterate the need to pursue WTO reform to improve all its functions through an inclusive member-driven process and remain committed to conducting discussions with a view to having a fully and well-functioning dispute settlement system accessible to all members by 2024.[102]

The diverse efforts exerted throughout 2023, which include numerous discussions and initiatives, reflect the Members' collaborative endeavors to achieve a successful reform of the DSM. The Appellate Body needs to be restored for a fully functioning DSM. The WTO panels and the Appellate Body have handled complex legal questions and structural issues from the overall architecture of the WTO Agreements, and as such they need to offer reliable jurisprudence for fisheries subsidies as well. Without a fully operating DSM, the FSA will not be able to accrue enough legitimacy and is likely to stand on a shaky legal platform. Not only for the WTO regime in general but also for the successful first step of the FSA, the restoration of the Appellate Body and the revitalization of the DSM are indeed critical.

V. CONCLUDING THOUGHTS

At this point, it is not clear whether the new FSA will converge with the SCM Agreement under the general subsidy umbrella in a smooth manner or stand on its own to develop its own jurisprudence in the novel area of fisheries subsidies. On the one hand, the FSA incorporates the basic structure of the SCM Agreement and borrows core elements from the latter. On the other hand, however, it also plans (or is designed) to deviate from the basic structure and core elements of the SCM Agreement. Systemic conflicts and uncertainties may be inevitable in the early stage of implementing the FSA as a new covered agreement dealing with environmental issues for the first time within the WTO regime. One way or another, however, this fundamental question on the exact relationship between the FSA and the SCM Agreement should be addressed and clarified before it is too late.

All in all, the FSA poses various structural fissures in using *existing* subsidy templates in designing *new* legal norms through trade agreements. Importing the existing templates is helpful and efficient, but it also invites a systemic tension. The effort of the WTO to address this systemic tension will shed important light on diverse WTO projects that stand to address other non-trade issues in the future, and also on other trade agreements (e.g., Free

臺大學術期刊資料庫

[102] *See G20 New Delhi Leaders' Declaration*, G20 ¶ 19(i) (Sept., 2023), https://www.mea.gov.in/Images/CPV/G20-New-Delhi-Leaders-Declaration.pdf.

Trade Agreements and sector-specific plurilateral agreements) that are increasingly coping with a wide range of non-trade topics such as labor, human rights and environment by incorporating them into their existing templates.

As further negotiations take place at the WTO to tackle remaining issues of fisheries subsidies in 2023 and 2024, and as efforts are mobilized for the entry into force of the FSA, WTO Members are advised to be apprised of these structural legal questions and try to address them as soon as possible. As much as the FSA is important for the conservation of global fish stocks, it is critical to devise the agreement to fit and dovetail with the existing WTO regime.

臺大學術期刊資料庫

REFERENCES

Articles

Bangura, Kadijatu Zainab & Abraham Zaqi Kromah (2022), *The WTO's Fisheries Subsidies Agreement: What's New and What's Next?*, 17(10) GLOBAL TRADE AND CUSTOMS JOURNAL 431.

Clarke, Peggy A. & Gary N. Horlick (2005), *The Agreement on Subsidies and Countervailing Measures*, *in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 679 (Patrick F. J. Macrory et al. eds.).

Fiorini, Matteo et al. (2020), *WTO Dispute Settlement and the Appellate Body: Insider Perceptions and Members' Revealed Preferences*, 54(5) JOURNAL OF WORLD TRADE 667.

Hoekman, Bernard M. et al. (2023), *Managing Externalities in the WTO: The Agreement on Fisheries Subsidies*, 26(2) JOURNAL OF INTERNATIONAL ECONOMIC LAW 266.

Lennan, Mitchell & Stephanie Switzer (2023), *Agreement on Fisheries Subsidies*, 38 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 161.

Cases

Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WTO Doc. WT/DS70/AB/R (adopted August 20, 1999).

Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft Recourse by Brazil to Article 21.5 of the DSU*, WTO Doc. WT/DS70/AB/RW (adopted August 4, 2000).

Appellate Body Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/AB/R (adopted June 1, 2011).

Appellate Body Report, *United States — Conditional Tax Incentives for Large Civil Aircraft*, WTO Doc. WT/DS487/AB/R (circulated September 4, 2017).

Appellate Body Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, WTO Doc. WT/DS212/AB/R (adopted January 8, 2003).

Appellate Body Report, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO Doc. WT/DS436/AB/R (adopted December 19, 2014).

Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc. WT/DS257/AB/R (adopted February 17, 2004)

Panel Report, *Australia — Subsidies Provided to Producers and Exporters of Automotive Leather*, WTO Doc. WT/DS126/R (adopted June 16, 1999).

Panel Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WTO Doc. WT/DS70/R (adopted August 20, 1999).

Panel Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/R (adopted June 1, 2011).

Panel Report, *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO Doc. WT/DS436/R (adopted December 19, 2014).

Panel Report, *United States — Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WTO Doc. WT/DS353/RW (adopted April 11, 2019).

Treaties

Agreement on Agriculture, April 15, 1994, Marrakesh agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 410.

Agreement on Subsidies and Countervailing Measures, April 15, 1994, Marrakesh agreement Establishing the World Trade Organization, Annex 1, 1869 U.N.T.S. 14.

General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

WTO-Related Documents

General Council, *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, Decision of 27 November 2014*,WTO Doc. WT/L/940 (November 28, 2014), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=128901&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

World Trade Organization, Agreement on Fisheries Subsidies, WTO Doc. WT/MIN(22)/33 (June 22, 2022).

Negotiating Group on Rules, *Communication from Argentina, Chile, Egypt and Uruguay,* Fisheries Subsidies: Special and Differential Treatment, TN/RL/GEN/173/Rev.1 (January 26, 2011).

Negotiation Group on Rules, *Communication from the Chairman*,

TN/RL/W/254 (April 21, 2011).

Negotiating Group on Rules, *Communication from the Republic of Korea, Fisheries Subsidies – Articles III, V, and X*, TN/RL/GEN/178 (March 10, 2011).

Negotiating Group on Rules, *Contribution to the Discussion on the Framework for the Disciplines on the Fisheries Subsidies*, TN/RL/W/172 (February 22, 2005).

World Trade Organization Committee on Trade and Environment, *GATT/WTO Rules on Subsidies and Aids Granted in the Fishing Industry*, WT/CTE/W/80 (March 9, 1998).

U.N.-Related Document

Food and Agriculture Organization of the United Nations, Marine Fisheries and the Law of the Sea: A Decade of Change, FAO Doc. FIDI/C853 (November 1993).

Food and Agriculture Organization of the United Nations, *Verbatim Records of Plenary Meetings of the Council*, FAO Doc. CL 171/PV (December 9, 2022).

United Nations, FINANCING FOR SUSTAINABLE DEVELOPMENT REPORT 2023: INTER-AGENCY TASK FORCE ON FINANCING FOR DEVELOPMENT, U.N. Sales No. E.23.I.6 (2023).

Internet Sources

Tipping, Alice, *WTO Members Clinch a Deal on Fisheries Subsidies*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (June 17, 2022), https://sdg.iisd.org/news/wto-members-clinch-a-deal-on-fisheries-subsidies/.

CHINA FORMALLY ACCEPTS AGREEMENT ON FISHERIES SUBSIDIES, https://www.wto.org/english/news_e/news23_e/fish_27jun23_e.htm.

DG (Director-General) and Fisheries Subsidies Chair Urge Members to Bridge Differences Before Year-End, WORLD TRADE ORGANATION (November 10, 2023), https://www.wto.org/english/news_e/news23_e/fish_10nov23_e.htm.

G20 New Delhi Leaders' Declaration, G20 (September, 2023), https://www.mea.gov.in/Images/CPV/G20-New-Delhi-Leaders-Declaratio n.pdf.

Implementing the WTO Agreement on Fisheries Subsidies, WORLD TRADE ORGANIZATION (2022), https://www.wto.org/english/res_e/booksp_e/impfishag_dgmessage_e.pdf.

Members Briefed on Informal Dispute Settlement Reform Talks, WORLD TRADE ORGANIZATION (March 31, 2023), https://www.wto.org/english/news_e/news23_e/dsb_31mar23_e.htm.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD REVIEW OF FISHERIES 2022 (2022).

臺大圖書期刊資料庫

REVISED AGREEMENT ON GOVERNMENT PROCUREMENT, https://www.wto.org/english/tratop_e/gproc_e/gp_revised_gpa_e.htm.

Summary of the Agreement and What It Means for Developing Country and Least-Developed Country Members, WORLD TRADE ORGANZIATION (2022), https://www.wto.org/english/res_e/booksp_e/impfishag part_2_e.pdf

TWELFTH WTO MINISTERIAL CONFERENCE, https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm.

WTO Fisheries Subsidies Negotiations, CONGRESSIONAL RESEARCH SERVICE (2023), https://crsreports.congress.gov/product/pdf/IF/IF11929.

TRADE FACILITATION, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

WTO Members Advance Fisheries Subsidies Negotiations at Second Fish Week, WORLD TRADE ORGANATION (April 28, 2023), https://www.wto.org/english/news_e/news 23_e/fish_28apr23_e.htm.

WTO Director-General Calls for Ratification of Fisheries Subsidies Agreement, THE GHANA REPORT (September 22, 2023), https://www.theghanareport.com/wto-director-general-calls-for-ratification-of-fisheries-subsidies-agreement/.

Working Paper, and Other Source

Irschlinger, Tristan & Alice Tipping (2022), *A Draft WTO Agreement on Fisheries Subsidies: What's on the Table?*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT 1.

Matteom, Milazzo (1998), Subsidies in World Fisheries: A Reexamination (World Bank's Fisheries Series, Technical Paper No. 406).

臺大學術期刊資料庫