# IMPLEMENTATION OF VIETNAM'S COMMITMENTS ON FISHERIES SUBSIDIES IN ITS FTAS AND RECOMMENDATIONS FOR THOSE UNDER THE WTO AGREEMENT ON FISHERIES SUBSIDIES

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## ABSTRACT

*The Agreement on Fisheries Subsidies (hereinafter "AFS"), a major achievement of the multilateral trading system to foster ocean sustainability was adopted on 17th June 2022. Before the completion of the AFS, however, several World Trade Organization members had already committed themselves to a number of binding commitments relating to fisheries subsidies in their free trade agreements. Vietnam is not an exception to this trend. The country made general and specific commitments on fisheries subsidies, embedded in Chapter 20 on the environment of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "CPTPP") and Chapter 13 on trade and sustainable development of the EU–Vietnam Free Trade Agreement (hereinafter "EVFTA"). Since January 2019 when CPTPP entered into force for Vietnam, the implementation of fisheries subsidies related obligations has generated both positive results and challenges. Difficulties remain for Vietnam in areas such as promulgating*

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*regulations on the prohibition of fisheries subsidies, finding other supports to replace the harmful subsidies, as well as collecting data and governance, and to comply with transparency requirements on fisheries subsidies. This paper aims to outline the commitments Vietnam has undertaken within the framework of the CPTPP and EVFTA, demonstrating achievements and challenges in the implementation of such commitments, thereby providing some recommendations for Vietnam with regard to commitments in the AFS.*

**KEYWORDS:** *sustainable development, fisheries subsidies, FTA, WTO, Vietnam, CPTPP, EVFTA*

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## I. INTRODUCTION

Fishing remains a vital source of nutrition, animal protein and income for many coastal countries.[1] Not surprisingly, the volume of fish stocks being exploited worldwide has been on the increase corresponding to the acceleration of globalization.[2] As indicated in the United Nations (hereinafter "U.N.") Food and Agriculture Organization's 2022 report, 35% of global fish stocks are exploited beyond sustainable levels; meanwhile, other experts noted that approximately $22 billion have been spent annually in subsidies to industrial fishing fleets which aim at enabling fishermen to go farther to sea and for longer periods of time.[3] These fisheries subsidies not only create distortions in international markets but also eventually contribute to overfishing. For decades, fisheries subsidies have been a topical issue under negotiation within the framework of the World Trade Organization (hereinafter "WTO") and not until June 2022 did members of the Organization culminate their efforts into the Agreement on Fisheries Subsidies (hereinafter "AFS").

The AFS, the only second multilateral deal to date reached within the framework of the WTO since its establishment more than two decades ago, marks a historic step towards the achievement of sustainable development goal (hereinafter "SDG") 14, particularly in ensuring ocean sustainability.[4]

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[1] *Fisheries Subsidies*, U.N. ENV'T PROGRAMME, https://www.unep.org/explore-topics/green-economy/what-we-do/environment-and-trade-hub/fisheries-subsidies (last visited Mar. 8, 2024).
[2] *Id.*
[3] *Fisheries Subsidies Agreement: What's the Big Deal?*, PEWTRUST (May 10, 2023), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2023/05/fisheries-subsidies-agreement-whats-the-big-deal.
[4] *Agreement on Fisheries Subsidies*, WORLD TRADE ORGANIZATION [hereinafter WTO], https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm (last visited Mar. 8, 2024).

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Composed of twelve articles, the Agreement bans support for illegal, unreported, and unregulated (hereinafter "IUU") fishing, fishing of overfished stocks, and fishing of unmanaged stocks on the high seas. In such a way, it aims at curbing subsidies for overcapacity and overfishing through curtailing subsidies for fishing on the unregulated high seas in a legally binding manner.[5] The Agreement needs two-thirds of members to deposit their instrument of acceptance before it could take effect.

Vietnam, amongst others, has not ratified the Agreement.[6] Being a coastal country with a huge potential for fish exploitation, however, the country had already committed itself to a number of binding provisions on fisheries subsidies in its free trade agreements way before the adoption of the AFS in 2022. Specifically, Chapter 20 on the environment of the CPTPP and Chapter 13 on trade and sustainable development of the EU–Vietnam Free Trade Agreement (hereinafter "EVFTA") effectively contain provisions relating to fisheries subsidies. These agreements remain the most ambitious Free Trade Agreements (hereinafter "FTAs") that Vietnam has ever participated in, exercising a strong degree of liberalization and a higher level of commitment than most of the existing FTAs of Vietnam. Since 2019 and 2020, when CPTPP and EVFTA entered into force for Vietnam respectively, the country has implemented several fisheries subsidy related obligations which generated both positive results and challenges.

On such a basis, the below analysis will first provide an overview of the commitments that Vietnam undertook in its FTAs, focusing on the EVFTA and CPTPP, followed by a discussion on the practical experience of Vietnam in implementing these FTA fisheries subsidies related obligations in which its context as well as results and challenges are presented. Finally, some recommendations will be provided with regard to similar obligations under the AFS so as to facilitate the participation of Vietnam to further curbing harmful fisheries subsidies that contribute to overcapacity and overfishing.

## II. OVERVIEW OF THE VIETNAM'S COMMITMENTS ON FISHERIES SUBSIDIES IN ITS FTAS

Of the FTAs that Vietnam has signed, commitments on fisheries subsidies are concentrated in the EVFTA and CPTPP.

### *A. The EU–Vietnam Free Trade Agreement*

The EVFTA, which took effect on 1st August 2020, is a new generation FTA between Vietnam and twenty-seven European Union (hereinafter

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[5] WTO, *Agreement on Fisheries Subsidies*, 4-5, WT/MIN(22)/33 (June 22, 2022) [hereinafter AFS].
[6] As of November 2023, when this paper is written and completed.

"EU") member states. From Vietnam's perspective, EVFTA is the second highest standard that Vietnam has signed (along with the CPTPP), with commitments covering many fields, a strong degree of liberalization and a higher level of commitment than most of the existing FTAs of Vietnam. Therefore, EVFTA is assessed to bring significant and positive impacts to Vietnam's economy and institutions. From the EU's perspective, the agreement with Vietnam is the second trade agreement the EU has concluded with the Association of Southeast Asian Nations (hereinafter "ASEAN") member state, following the recent agreement with Singapore. It represents an important milestone in the EU's engagement strategy with Asia.

EVFTA touches upon fisheries subsidies issues in a loose manner. Chapter 13 on sustainable development includes Article 13.9 on Trade and Sustainable Management of Living Marine Resources and Aquaculture Products and this remains the sole article regulating specifically on fisheries sector. Article 13.9, however, firstly promotes compliance with relevant international treaties, i.e., Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") 1982; Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993; the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009, etc. In addition, Parties are required to actively engage in the fight against IUU fishing and fishing-related activities, thereby excluding products resulting from IUU from trade flows. The Committee on Trade and Sustainable Development shall be established to review and assess the implementation of these commitments. Meanwhile, any matters relating to Chapter 13 in general and particularly Article 13.9 shall be merely settled by the Panel of Experts and Government Consultations while the dispute settlement and mediation mechanism of the whole EVFTA under Chapter 15 shall be not applied.

In essence, EVFTA takes a rather relaxed approach towards the conservation and management of marine living resources, and policy obligations relating to the fisheries sector generated under Article 13.9 are mostly in the form of recommendations, with emphasis on cooperation, information exchange, and development of sustainable aquaculture.

### *B. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership*

The CPTPP entered into force for Vietnam in January 2019. Compared to EVFTA, Chapter 20 on the environment of the CPTPP provides a range of commitments under Article 20.16 which are more specific to fisheries subsidies. In addition to acknowledging the importance of the marine

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fisheries sector and the conservation and sustainable management of fisheries subsidies, Parties are required to manage a fisheries management system based on best scientific evidence available and best practices that (i) prevents overfishing and overcapacity, (ii) reduces bycatch of non-target species and juveniles, and (iii) promote the recovery of overfished stocks for all marine fisheries. In strengthening the fight against subsidies that contribute to overfishing, CPTPP parties are prohibited from granting or maintaining certain types of: (a) subsidies for fishing that negatively affect fish stocks that are in an overfished condition; and (b) subsidies provided to any fishing vessel while listed by the flag State or a relevant Regional Fisheries Management Organization or Arrangement for IUU fishing.[7]

It should be noted that, however, the provisions in CPTPP do not cover all types of fisheries subsidies that the WTO intends to prohibit, but only two types of fisheries subsidies that have negative impacts on fish stocks. Regarding the first type of fisheries subsidies, while other CPTPP parties have to implement this obligation within three years from the respective dates of entry into force of the CPTPP for that party, Vietnam can request for an extension of two additional years making a total of five years from 14th January 2019, the date which CPTPP entered into force for Vietnam, to implement this obligation, thereby bringing any subsidy programs into conformity with Article 20.16.5(a) of the CPTPP.[8] In the same vein as EVFTA, moreover, parties to the CPTPP are required to improve cooperation internationally, facilitate information exchange among Parties to actively engage in the fight against IUU fishing activities, and provide other Parties the opportunity to comment on proposed measures that are designed to prevent trade in fisheries products that results from IUU fishing.[9] Furthermore, unlike the EVFTA, any disputes arising from Chapter 20 and particularly Article 20.16 could then be subject to the dispute settlement procedure of the whole CPTPP as stipulated under Chapter 28. The procedure may start with consultations and when consultations have failed to resolve the matters at hand, the establishment of a panel may be requested in accordance with Article 28.7 to provide solutions for the dispute.

When the CPTPP enters into force, admittedly, parties that have ratified this agreement will be obliged to fully comply with the fisheries subsidy's prohibition mentioned above, which will also pave the way for further implementation of the WTO regulations on fisheries subsidies once these countries have ratified the AFS.

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[7] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 20.16.1-6, Dec. 1, 2019, 3346 U.N.T.S. 1 [hereinafter CPTPP].

[8] *See* CPTPP, art. 20.16.6: Vietnam may request an extension of two additional years to bring any subsidy programmes into conformity with paragraph 5 of Article 20.16 by providing a written request to the Committee no later than six months before the expiry of the three-year period provided for in paragraph 6 of the same Article.

[9] *See* CPTPP, art. 20.16.13, 20.16.15.

## III. IMPLEMENTATION OF VIETNAM'S COMMITMENTS ON FISHERIES SUBSIDIES IN ITS FTAS

Vietnam's FTA commitments on fisheries subsidies are incorporated in the CPTPP and EVFTA. After a transition period, Vietnam must implement the commitments within CPTPP. For EVFTA, Vietnam has shown efforts to combat the IUU fishing in recent years, thereby, contributing to the implementation of its commitments on the prohibition of subsidies for illegal fishing. In this section, the authors will analyze some results of this implementation (B) after consideration of its context (A).

### *A. Context for the Implementation*

Vietnam's commitments on fisheries subsidies on its FTAs are implemented in a general context of its political willingness for sustainable marine economic development and the European Commission (hereinafter "EC")'s yellow card on illegal fishing.

First, Vietnam has expressed its political willingness on sustainable marine economic development. This willingness resulted, on one hand, from the undeniable role of the marine economy for Vietnam, and on the other hand, the country's awareness of the serious deterioration of the marine environment, given the importance of the marine economy for Vietnam.

As a coastal country, Vietnam has a coastline of over 3,260 kilometers, with an area of water under sovereignty, sovereign rights and jurisdiction of over one million square kilometers. Vietnam has more than 50% of the population living in 28 coastal provinces and cities. Therefore, Vietnam has great potentials for marine economic development, including sea transportation, mining and mineral processing, exploiting, farming and processing seafood products; and developing marine tourism . . . .[10] Regarding the fishing industry, Vietnam's seafood resources are highly abundant. For the sea fishes, more than 2,000 different species have been discovered, of which about 100 species have economic value. According to recent statistics, the fish reserve in Vietnam's water generates approximately 5 million tons per year and Vietnam can exploit about 2-3 million tons annually.[11]

However, developing the marine economy while ensuring ocean sustainability remains a big challenge for Vietnam. The Country Report on the National Sea and Island Environment in the 2016-2020 period published

[10] Hoang Van Khai, *Phát triển kinh tế biển Việt Nam – Tiềm năng và thách thức* [*Developing Vietnam's Marine Economy – Potentials and Challenges*], TẠP CHÍ CỘNG SẢN [COMMUNIST MAGAZINE] (June 19, 2020), https://mic.gov.vn/Daotaonghe/Pages/TinTuc/142675/Phat-trien-kinh-te-bien-Viet-Nam---Tiem-na ng-va-thach-thuc.html.

[11] *Id*.

in 2021 by the Ministry of Natural Resources and Environment indicated that Vietnam's marine exploitation is unsustainable, accelerating the rate of biodiversity loss and that overexploitation and overfishing often occur.[12]

This situation forced Vietnam to adopt a number of strategies and policies for sustainable marine economic development, thereby creating an important political and legal basis for further implementation of its commitments on fisheries subsidies. It is significant to recall the Party's Resolution No. 36-NQ/TW dated 22nd October 2018 on the strategy for sustainable development of Vietnam's marine economy until 2030, vision to 2045[13] and the Government's Resolution No. 48/2023/NQ-CP dated 3rd March 2023 approving the strategy for sustainable exploitation, use of resources and protection of the marine and island environment by 2030 and vision to 2050.[14] These strategies lay out and prioritize objectives that Vietnam must achieve in medium to long-term in order to facilitate the protection of marine ecosystem in a sustainable manner and to make Vietnam a strong maritime economy.

For the fisheries sector, Vietnam's Prime Minister promulgated a decision approving the strategy for developing its fisheries by 2030 with a vision to 2045.[15] This strategy has clearly demonstrated strategic objectives

[12] According to the Report, about 100 rare marine species have been recorded in Vietnam (have been included in the Vietnam Red Book) and the International Union for Conservation of Nature [IUCN] Red List at risk of threat and need to be protected (including thirty-seven species of marine fish, six species of coral, five species of echinoderm, four species of dragon shrimp, one species of crab, twenty-one species of snail, six species of bivalves, three species of squid). Research results of the Food and Agriculture of the United Nations [FAO] and other international organizations in recent years have shown that more than 80% of fish stocks in coastal and offshore waters have been exploited, in which up to 25% of the fish is overexploited or exhausted. Many other marine species are at risk of extinction. *See* HIỆN TRẠNG MÔI TRƯỜNG BIỂN VÀ HẢI ĐẢO QUỐC GIA GIAI ĐOẠN 2016 - 2020 [REPORT ON THE NATIONAL SEA AND ISLAND ENVIRONMENT IN THE 2016-2020 PERIOD], BỘ TÀI NGUYÊN VÀ MÔI TRƯỜNG [MINISTRY OF NATURAL RESOURCES AND ENVIRONMENT], at 91 (2021), https://monre.gov.vn/VanBan/Lists/VanBanChiDao/Attachments/2633/MSOE%202016-2020.pdf; *see also* Nguyen Xuan Cuong & Nguyen Thu Ha, *Giải pháp đảm bảo an ninh môi trường biển Việt Nam* [*Solutions to Secure Marine Environment Security in Vietnam*], 3 TẠP CHÍ KHOA HỌC XÃ HỘI VIỆT NAM [VIETNAM SOCIAL SCIENCES REVIEW] 54, 56 (2022).

[13] *Resolution No. 36-NQ/TW Dated 22th October 2018 of the 8th Meeting of the 12th Central Committee of the Communist Party on the Strategy for Sustainable Development of Vietnam's Marine Economy Until 2030, Vision To 2045*, TƯ VẤN PHÁP LUẬT [LEGAL CONSULTING] (Oct. 22, 2018), https://thuvienphapluat.vn/van-ban/Thuong-mai/Nghi-quyet-36-NQ-TW-2018-chien-luoc-phat-trien-ben-vung-kinh-te-bien-Viet-Nam-den-nam-2030-397978.aspx.

[14] *Resolution No. 48/NQ-CP Dated 3rd April 2023 of the Government Approving the Strategy for the Sustainable Exploitation, Use of Resources and Protection of the Marine and Island Environment by 2030 and Vision for 2050*, TƯ VẤN PHÁP LUẬT [LEGAL CONSULTING] (Apr. 3, 2023), https://thuvienphapluat.vn/van-ban/Tai-nguyen-Moi-truong/Nghi-quyet-48-NQ-CP-2023-khai-thac-su-dung-ben-vung-tai-nguyen-bao-ve-moi-truong-bien-va-hai-dao-561680.aspx.

[15] *Decision No. 339/QD-TTg Dated 11th March 2021 of the Prime Minister Approving the Strategy for Development of Vietnam's Fisheries by 2030 with Vision to 2045*, TƯ VẤN PHÁP LUẬT [LEGAL CONSULTING] (Mar. 21, 2023), https://thuvienphapluat.vn/van-ban/Tai-nguyen-Moi-truong/Quyet-dinh-339-QD-TTg-2021-phe-duyet-Chien-luoc-phat-trien-thuy-san-Viet-Nam-den-2030-467332.aspx.

to develop fisheries in a sustainable manner with eleven prioritized programs and projects, including two national programs assigned to the Ministry of Agriculture and Rural Development (one to protect and develop aquatic resources and the other to develop effective and sustainable fisheries exploitation).[16]

It is also important to note that the implementation of Vietnam's commitments on fisheries subsidies also falls into its broader strategy and plan to implement the United Nations' 2030 Agenda for Sustainable Development. Vietnam has nationalized this ambitious Agenda into a National Action Plan with seventeen sustainable development goals and 115 specific goals in line with national development conditions and priorities,[17] which are concretized in a number of strategies and plans adopted at ministry or provincial levels. For the implementation of Article 14.6 SDG, the Ministry of Agriculture and Rural Development is tasked with three missions, including: i) the development of a roadmap to eliminate subsidies having adverse impacts on seafood resources that are already in a state of overfishing and all forms of subsidies for IUU fishing vessels; ii) the implementation of a resource exploitation tax policy for aquatic exploitation activities to promote sustainable aquatic exploitation activities; and iii) creating access to marine resources and markets for small-scale fishermen, especially poor fishing households.[18] Successfully deploying these missions will create favorable conditions for the implementation by Vietnam of its FTAs' fisheries subsidies commitments.

Second, Vietnam has taken drastic actions to prevent and combat IUU fishing, especially after the application of the IUU yellow card by the EC to seafood products exported from Vietnam. It is important to recall that since October 2017, the EC applied the IUU yellow card to seafood exported from Vietnam for having not respected IUU fishing regulations.[19] The EC's press release indicated the reasons for this application as follows: "Vietnam is not doing enough to fight illegal fishing" and some shortcomings exist as "the lack of an effective sanctioning system to deter IUU fishing activities and a lack of action to address illegal fishing activities conducted by Vietnamese vessels in waters of neighboring countries" and "a poor system to control

[16] *See id.* at section V and Annex of the Decision.

[17] *Decision No. 622/QD-TTg Dated 10th May 2017 of the Prime Minister Promulgating the National Action Plan to Implement the 2030 Agenda for Sustainable Development*, TƯ VẤN PHÁP LUẬT [LEGAL CONSULTING] (May 10, 2017), https://thuvienphapluat.vn/van-ban/Thuong-mai/Quyet-dinh-622-QD-TTg-2017-Ke-hoach-hanh-dong-quoc-gia-thuc-hien-Chuong-trinh-nghi-su-2030-348831.aspx [hereinafter *Decision 622/QD-TTg*]; *Vietnam's 17 Sustainable Development Goals*, MINISTRY INDUS. & TRADE (Sept. 16, 2021), https://moit.gov.vn/tin-tuc/tiet-kiem-nang-luong/17-muc-tieu-phat-trien-ben-vung-cua-viet-nam.html.

[18] *Decision 622/QD-TTg*, *supra* note 17, at Annex I, SDG 14.6.

[19] European Commission Press Release IP/17/4064, the Commission, Commission Warns Vietnam over Insufficient Action to Fight Illegal Fishing (Oct. 23, 2017).

landings of fish that is processed locally before being exported to international markets, including the EU".[20]

Under the Council Regulation (EC) no 1005/2008 of 29 September 2008,[21] this yellow card is considered as a warning and offers the possibility for Vietnam to take measures to rectify the situation within a reasonable period of time. Even though it does not entail any measures affecting trade, it negatively affected Vietnam's seafood export to the EU market in recent years due to difficulties that Vietnamese seafood exporters faced in complying with the certification system required by the Regulation (*see table 1*).

TABLE 1: Vietnam's Seafood Exports to the EU After Five Years Under the EC's IUU Yellow Card[22]

| | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|
| Total exports to the EU (USD million) | 1,480 | 1,471 | 1,297 | 958 | 1,076 | 1,309 |
| Growth rate (%) | | -1 | -12 | -26 | 12 | 22 |

As seen from the above table, after the yellow card application, Vietnam's seafood exports to the EU market decreased continuously from 2017 to 2020. Of these, the export of most seafood products to the EU decreased significantly: shrimps experienced a decrease of 29%, catfish experienced a decrease of 48%, squid and octopus saw a decrease of 43%, and crabs with a decrease of 63%.[23] This situation will be more serious if the EC decide to apply the "red card", equivalent to an export ban, to seafood products coming from Vietnam. According to an estimation based on 2019 data, Vietnam's fishing industry will lose approximately 480 million USD (including about 387 million USD per year from the EU market for direct

[20] *Id.* at 1.
[21] Council Regulation (EC) No. 1005/2008 of 29 September 2008, 2008 O.J. (L 286) 1.
[22] Nguyen Hoai Nam, *Vietnam's Solutions Towards Removal of EC's Yellow Card*, *in* WTO Chairs Program at FTU, University of Tours and University of Rennes II, International workshop on "Trade and Marine Environment Protection: Situation and Perspectives of International, Regional and National Laws" (Apr. 5-6, 2023).
[23] *Id*.

losses and 93 million USD for indirect losses).[24] These losses will be increased to 508 million USD if the estimation is based on 2022 data.[25]

Fear of losing the EU market for its seafood products forced Vietnam to take proactive actions in preventing and combating IUU fishing. In other words, the EC's application of the IUU yellow card to Vietnam has helped Vietnam to better comply with its relevant commitments on fisheries subsidies.

### *B. Some Results and Challenges*

The implementation of fisheries subsidies related obligations demonstrates some positive results and also challenges for Vietnam, specifically:

For positive results, among its substantial and procedural commitments to fisheries subsidies, Vietnam has some positive results on the implementation of those related to IUU fishing, showcasing its efforts in four main aspects[26]:

1. With regard to the legal framework: Vietnam has made efforts to enhance the quality of its legal framework related to IUU fishing. Vietnam has effectively issued the Law on Fisheries of 2017 and nineteen legal guiding documents on fisheries (including six decrees, eleven circulars and one decision). One of the most important provisions in these documents is the explicit ban on IUU fishing which means subsidies for the IUU fishing can no longer be granted.
2. Regarding the inspection and control of operations of fishing vessels to prevent IUU fishing: The Prime Minister has requested local authorities to review the entire number of fishing vessels, and update fishing vessel data in the National Fisheries Database (VNFishbase).[27] This database has so far been deployed in thirty-one provinces and cities and allows the regular update of fishing vessel data information on registration and

[24] VIET. ASS'N SEAFOOD EXP. & PRODUCERS & THE WORLD BANK, ĐÁNH GIÁ TÁC ĐỘNG KINH TẾ TỪ PHÂN TÍCH THƯƠNG MẠI CỦA VIỆC KHÔNG TUÂN THỦ QUY ĐỊNH VỀ CHỐNG KHAI THÁC THỦY SẢN BẤT HỢP PHÁP, KHÔNG BÁO CÁO VÀ KHÔNG THEO QUY ĐỊNH (IUU): TRƯỜNG HỢP VIỆT NAM [ASSESSING THE ECONOMIC IMPACT FROM TRADE ANALYSIS OF NON-COMPLIANCE WITH REGULATIONS TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED (IUU) FISHING: THE CASE OF VIETNAM] 50 (2021), https://wtocenter.vn/file/18515/a-trade-based-analysis-of-the-economic-impact-in-vnese.pdf.

[25] Nguyen, *supra* note 22.

[26] Hai Dang, *Nỗ lực và quyết tâm cao để sớm gỡ "thẻ vàng" IUU* [*Efforts and Determination to soon Remove the IUU "Yellow Card"*], TRANG TIN CỤC THỦY SẢN (VIỆT NAM) [DEP'T FISHERIES (VIETNAM)] (Aug. 29, 2023), https://tongcucthuysan.gov.vn/vi-vn/tin-t%E1%BB%A9c/-tin-v%E1%BA%AFn/doc-tin/019567/2023-08-30/no-luc-va-quyet-tam-cao-de-som-go-the-vang-iuu.

[27] This database has been established by the *Decision No. 8I/QD-TTg Dated 13th February 2023 Promulgating the "Action Plan to Combat the IUU Fishing and Preparing to Work with the 4th EC's Inspection"*, TỔNG CỤC THỦY SẢN [VIETNAM DIRECTORATE OF FISHERIES] (Feb. 13, 2023), https://vnf.tongcucthuysan.gov.vn/.

issuance of fishing licenses for fishing vessels. Furthermore, the fishing vessel monitoring system has been implemented synchronously from central to local authorities. As of August 29, 2023, cruise monitoring equipment (Vessel Monitoring System, hereinafter "VMS") has been installed on 97.86% (i.e., 28,753 out of 29,381) of vessels which are 15m length or more. Other fishing vessels that have not yet installed VMS equipment have been listed by local authorities for monitoring and management.

3. For seafood production certification and traceability: Certifying and tracing the origin of seafood from exploitation has been organized and implemented under the Vietnamese Law on Fisheries of 2017 and the Agreement on Port States Measures. Some ports and enterprises have been removed from the list of designated fishing ports for seafood origin certification and from the list of enterprises allowed to export to the EU.
4. For reinforcing the law enforcement forces: in Vietnam, maritime law enforcement forces (including Navy, Coast Guard, Fisheries Surveillance) patrol, inspect and control bordering, overlapping water areas to prevent and handle fishing vessels that violate IUU regulations. Since 2020, more than 4,000 violation cases have been sanctioned with a total fine of over 100 billion VND. Some provinces have increased penalties for violations occurring in foreign waters, violations of VMS, etc.

All these measures have been strictly implemented to help Vietnam act effectively against illegal fishing practices. As the IUU fishing is controlled, subsidies will no longer be used for this purpose.

Besides these results, Vietnam had to face some challenges that may affect the effective implementation of commitments related to the fisheries subsidies.

First, the absence of an exhibit prohibition of harmful subsidies in Vietnam's legislations remains a concern.

It is notable that Vietnam does not incorporate into the Law on Fisheries of 2017 a provision that stipulates an exhibit ban on harmful subsidies. As mentioned above, the prohibition of subsidies contributing to IUU fishing derives from the explicit ban on IUU fishing. Regarding other forms on harmful subsidies, especially subsidies for overfished of which a prohibition is required by article 20.6.5(a) of the CPTPP, there is also no prohibition provided for. It is important to indicate that under Resolution No. 72/2018/QH14 dated 12th November 2018 of the National Assembly ratifying the CPTPP, article 20.6 does not have a direct effect on Vietnam's territory. In other words, for its applicability, this provision needs to be transposed into Vietnam's domestic law.[28] So far, however, this has not been

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[28] Law on Treaties, 108/2016/QH13, (2016) (Vietnam) art.6.1.

the case. Such absence will not only affect the effective implementation of its commitments on fisheries subsidies but may also constitute Vietnam's non-compliance with the relevant commitments.

Second, Vietnam faces different difficulties in replacing the harmful subsidies.

According to Vietnam's notification under the requirement of Article XVI.1 of the GATT 1994 and Article 25 of the Agreement on subsidies and countervailing measures,[29] Vietnam's Government has deployed five subsidy programs for fisheries, including: i) preference in investment policies; ii) preference in credit policies; iii) preference in insurance policies; iv) preference in tax policies; and v) other relevant preferential policies for fishery development (see table 2).[30]

TABLE 2: Five Fisheries Subsidies' Programs of Vietnam[31]

| | Fisheries Subsidies Program | Value of subsidies for 2015-2020 period (VND billions) | Estimated value for 2020-2030 period (VND billions) |
|---|---|---|---|
| 1. | Preference in investment policies | 3,605.80 | 34,720.00 |
| 2. | Preference in credit policies | 17,763.00 | 2,800.00 |
| 3. | Preference in insurance policies | 126.00 | 4,475.00 |
| 4. | Preference in tax policies | 1,023.83 | - |
| 5. | Other relevant preferential policies for fishery development | - | 871.00 |
| | Total (VND billions) | 22,518.63 | 43,365.00 |
| | Total (USD millions) | 958.21 | 1,845.3 |

[29] Committee on Subsidies and Countervailing Measures, *New and Full Notification pursuant to Article XVI. 1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures – Viet Nam,* at 11-13, WTO Doc. G/SCM/N/284/VNM, G/SCM/N/315/VNM (Feb. 28, 2020).

[30] These programs were implemented in Vietnam according to the Decree no. 67/2014/ND-CP dated July 7, 2014 on a number of fishery development policies, amended by the Decree no. 89/2015/ND-CP dated Oct. 7, 2015, Decree no. 172/2016/ND-CP dated Dec. 27, 2016 and Decree no. 17/2018/ND-CP dated Feb. 2, 2018.

[31] BỘ NÔNG NGHIỆP VÀ PHÁT TRIỂN NÔNG THÔN [MINISTRY OF AGRICULTURE AND RURAL DEVELOPMENT], TỜ TRÌNH V/V BAN HÀNH NGHỊ ĐỊNH VỀ MỘT SỐ CHÍNH SÁCH PHÁT TRIỂN THUỶ SẢN [PROPOSAL FOR THE PROMULGATION OF THE DECREE ON CERTAIN FISHERY DEVELOPMENT POLICIES] (2022).

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These programs aim to realize five main objectives, including: i) to upgrade and build fishing ports and all necessary infrastructures for fishing activities and for fishing management; ii) to upgrade and modernize vessels, especially for converting from wooden to steel vessels; iii) to promote poverty alleviation; iv) to maintain and development traditional fisheries in a sustainable manner; and v) to support the conversion of fishing gears, aiming to eliminate completely the use of destructive gears.[32] Even though these objectives indicate that these programs have been deployed to ensure the sustainability of fishery development, based on Sumaila and others' fisheries subsidies classification,[33] some types of Vietnam's subsidies programs are considered harmful subsidies and the value of these subsidies occupied for 60% of those granted to fishery sector.

This situation undoubtedly presents two main concerns to Vietnam. For one, these subsidies will be maintained for the 2021-2030 period and harmful subsidies will continue to be granted. On the other hand, Vietnam has faced lots of difficulties to find out substituting aid or support from the international community to replace these subsidies. Since these subsidies occupied are of crucial importance for fishermen and the fish community in the coastal zones, without additional funds and support, stopping harmful subsidies will generate negative impacts, especially for the purpose and from the perspective of ensuring the lives of coastal people and national security for Vietnam.

Third, there are also difficulties in collecting data and governance.

It is important to recognize the efforts of the Vietnamese government regarding the collection of data relating to its aquatic resources. It has set up programs that run every five years to conduct overall survey and assessment of aquatic resources and habitats of aquatic species nationwide. In 2022, under the Prime Minister's Decision no. 523/QD-TTg,[34] such a program is implemented for two periods (2022-2025 and 2025-2030). For the period of 2022-2025, an estimated budget of 100 billion VND (i.e., 4.5 million USD) will be granted for the survey and assessment of aquatic habitats in Vietnam's territorial seas.[35] As a result, this program is expected to generate information and data on aquatic resources and habitats of species in

[32] Committee on Subsidies and Countervailing Measures, s*upra* note 29.

[33] U. Rashid Sumaila et al., *A Bottom-Up Re-Estimation of Global Fisheries Subsidies*, 12 J. BIOECONOMIC 201, 220 (2010); Sarah Harper & U. Rashid Sumaila, *Distributional Impacts of Fisheries Subsidies and Their Reform: Case Studies of Senegal and Vietnam*, INT'L INST. ENV'T & DEV. (2019), https://iied.org/sites/default/files/pdfs/migrate/16655IIED.pdf.

[34] *Decision No. 523/QD-TTg Dated 27th April 2022 of the Prime Minister Approving the Program of Overall Surveil and Assessment of Aquatic Resources and Habitats of Aquatic Species Nationwide Every 5 Years to 2030*, TƯ VẤN PHÁP LUẬT [LEGAL CONSULTING] (Apr. 27, 2022), https://thuvienphapluat.vn/van-ban/Linh-vuc-khac/Quyet-dinh-523-QD-TTg-2022-Chuong-trinh-dieu-tra-danh-gia-tong-th e-nguon-loi-thuy-san-511667.aspx.

[35] *See id.* at 5-7 (Annex I of this Decision).

Vietnam's seas and provide a scientific basis to serve the management and sustainable use of aquatic resources.

However, according to the *Global Fishing Index 2021* published by Minderoo, there are still many difficulties in collecting data and governance faced by Vietnam to ensure its sustainable fishing (see table 3):

TABLE 3: Vietnam's Score in Global Fishing Index 2021[36]

| | | Vietnam |
|---|---|---|
| Overall results | Grade (A to F) | F |
| | Progress score (out of 100) | 1.3 |
| | Governance level (0-12) | 3 |
| Progress results and supporting data | Data availability | 2.2% |
| | Stock sustainability | 61.9% |
| | Number of stocks assessed | 21 |
| | Number of official assessments | 10 |
| | Number of novel estimates | 11 |
| Governance results | Management capacity | 45 |
| | Information availability | 27 |
| | Level and control of access | 64 |
| | Compliance management system | 80 |
| | Stakeholder engagement | 65 |

Most data in Table 3 show that Vietnam is in a poor situation to ensure sustainable fishing. Until 2021, only 2.2% of data relating to all sea fish stocks in Vietnam are available for collecting and assessing. Therefore, only twenty-one sea fish stocks among over 1,000 stocks in Vietnam are assessed. This situation leads, as Minderoo observes, to "most fisheries lack science-based management".[37] In its report, Minderoo indicates three key issues related to the data and governance, including: i) most countries do not consistently collect or analyze fisheries data; ii) the available data is not being used for management; and iii) compliance with regulations is not being monitored or enforced.[38] Most of these key issues remain problematic for Vietnam. The main concern for the implementation of fisheries subsidies is that the assessment of overfished stocks, as a basis for the prohibition of subsidies contributing to overfishing, will be more difficult to achieve. On such a basis, Vietnam still needs technical assistance and support from relevant international organizations or regional fisheries management

[36] *The Global Fishing Index 2021: Assessing the Sustainability of the World's Marine Fisheries,* MINDEROO FOUND. 48 (2021), https://oursharedseas.com/wp-content/uploads/2022/01/20211120-global-fishing-index-2021-report.pdf.
[37] *Id.* at 38.
[38] *Id.*

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organizations to strengthen its capacities and improve the quality of data collection and assessment in this field.

Fourth, Vietnam also faces difficulties in compliance with transparency requirements.

In 2020, Vietnam notified to WTO its fisheries subsidy programs as required by the GATT Agreement and the SCM Agreement. However, these notifications, based on the transparency requirements of the CPTPP, still lack much important information, such as: i) catch data by species in the fishery for which the subsidy is provided; ii) status of the fish stocks; iii) fleet capacity; iv) conservation and management measures in place for the relevant fish stock; and v) total imports and exports per species.[39] A CPTPP's Member is only required to provide this information "to the extent possible". If it is readily available or reasonably accessible, it will be necessary to provide it and as requested, this information must be provided for each subsidy that falls within the scope of the CPTPP.[40] As indicated above, since the required information is available for at least twenty-one stocks assessed in Vietnam, the country will have to provide the data. Failure to provide the requested information will result in non-compliance with related provisions of the CPTPP.

In conclusion, the implementation of commitments on fisheries subsidies in Vietnam's FTAs, although achieving certain results, still faces many difficulties and challenges. These will certainly be problems that Vietnam may encounter when deciding to ratify the AFS and having to implement it.

## IV. THE WAY FORWARD: RECOMMENDATIONS FOR VIETNAM

At the end of 2023, more than fifty Members have deposited their instruments of acceptance of the Fisheries Subsidies Agreement to the WTO.[41] Some countries on the top of fifteen nations that are net subsidy-sources and net subsidy-sinks of harmful fisheries subsidies, such as the United States, China, the European Union, Japan, South Korea, and Belize[42] have accepted this agreement. It seems clear that the AFS's entry into force will be closer.[43]

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[39] *See* CPTPP, *supra* note 7, art. 20.16.10.

[40] *Self-Assessment Tool for the Implementation of the WTO Fisheries Subsidies Agreement*, INT'L INST. SUSTAINABLE DEV., 104 (2022), https://www.iisd.org/system/files/2022-10/assessment-tool-wto-fisheries-subsidies-agreement.pdf.

[41] *Members Submitting Acceptance of Agreement on Fisheries Subsidies*, WTO, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_acceptances_e.htm (last visited Mar. 9, 2024).

[42] Daniel J. Skerritt et al., *Mapping the Unjust Global Distribution of Harmful Fisheries Subsidies*, 152(105611) MARINE POL'Y 1, 2 (2023).

[43] *Surge of Formal Acceptances of Agreement on Fisheries Subsidies – Entry into Force Closer*, WTO (Oct. 23, 2023), https://www.wto.org/english/news_e/news23_e/fish_23oct23_e.htm.

For Vietnam, the current AFS does not create new obligations for Vietnam compared to its previously existing commitments in FTAs, i.e., CPTPP and EVFTA. Basically, the main obligations in the AFS are similar to Vietnam's obligations in the CPTPP. More specifically, like the CPTPP, the AFS requires that no Member shall grant or maintain subsidies for fishing or fishing-related activities in three cases: i) subsidies contributing to IUU fishing; [44] ii) subsidies regarding overfished stocks; [45] and iii) other subsidies. [46] The AFS also contains an article on notification and transparency[47] which requires the same obligation as in the CPTPP. This presents great advantages for Vietnam to consider ratifying and implementing this Agreement. However, Vietnam will also encounter difficulties as analyzed above and further challenges generated by the supposedly comprehensive disciplines which are under negotiations and expected to be adopted at the 13th Ministerial Conference in February 2024.[48]

To address these difficulties and challenges, few recommendations are foreseen for Vietnam, as followings:

First**,** taking the initiative to request technical assistance granted by the WTO grants to developing members on the basis of the Fisheries Funding Mechanism[49] or by other countries or international organizations.

According to Article 7 of the AFS, the WTO Fisheries Funding Mechanism was created to provide technical assistance and capacity building assistance to developing country Members. This Fund has three main objectives: i) provide technical assistance in support of Members' efforts to ensure compliance with the AFS, especially in eliminating the prohibited fisheries subsidies; ii) coordinate with partner organizations supporting beneficiary Members' establishment of the administrative links between the agencies responsible for subsidies and fisheries; iii) assist beneficiary Members to strengthen their fisheries management to meet the specific requirements of the AFS through collaboration with partner organizations.[50] Became operational on the 8th of November 2022 with the donations from Members,[51] this Fund will soon be able to start accepting applications for assistance.

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[44] *See* AFS, *supra* note 5, art. 3.
[45] *See id.* art. 4.
[46] *See id.* art. 5.
[47] *See id.* art. 8.
[48] *DG and Fisheries Subsidies Chair Urge Members to Bridge Differences Before Year-End*, WTO (Nov. 23, 2023), https://www.wto.org/english/news_e/news23_e/fish_10 nov23_e.htm.
[49] *See* AFS, *supra* note 5, art. 7.
[50] *WTO Fisheries Funding Mechanism,* WTO, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_fund_e.htm (last visited Mar. 9, 2024).
[51] Until Jan. 2024, more than ten Members donates to this Fund with the amount of more than ten million CHF. See related news in the WTO's websites: *Fisheries Funding Mechanism News Archives*, WTO, https://www.wto.org/english/news_e/archive_e/ffm_arc_e.htm (last visited Mar. 9, 2024).

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The existence of this Fund clearly shows that the WTO has anticipated the difficulties that many developing countries Members face when stopping all prohibited subsidies, as required by the AFS. Therefore, it's important to find that it will be one of the incentives for these Members to ratify the agreement.

As a developing country Member of the WTO, Vietnam will be eligible for submitting applications for assistance. Such assistance could help Vietnam partly overcome difficulties related to data collection and governance as well as create jobs for coastal people affected by the elimination of these subsidies.

Second**,** considering adding clear regulations to the national legal system prohibiting the granting of prohibited subsidies.

It remains important to note that Article 3.7 of the AFS explicitly requires Members to "have law, regulations and/or administrative procedures in place to ensure that subsidies [contributing to IUU fishing], including such subsidies existing at the entry into force of this Agreement, are not granted or maintained". This requirement does not apply to subsidies regarding overfished stock and other subsidies. However, Vietnam could consider adding a new regulation in its Law on Fisheries of 2017 that expressly prohibits the grant or maintaining the harmful subsidies covered by the AFS and then, promulgating specific regulations guiding the implementation of this prohibition. These regulations should, at least, provide the definitions of related prohibited subsidies, their determination, procedures for their management, and enforcement measures. The new legal framework will not only help Vietnam comply with relevant international and regional commitments in this field, but also help the country disseminate those commitments to domestic entities, especially fishermen, who occupy an important role in not carrying out IUU fishing or overfishing.

Third, actively participating in the negotiations of new disciplines on fisheries subsidies at the WTO to facilitate its understanding of the nature and application of these rules.

As indicated in Article 12 of the AFS, comprehensive disciplines for regulating harmful fisheries subsidies should be adopted within four years of the entry into force of the AFS. Therefore, for more than a year, intensive negotiations have continued within the Negotiating Group on Rules with a draft published on December 21, 2023.[52] This draft shows that new disciplines relating to subsidies contributing to overcapacity and overfishing, including regulations to determine such a subsidy,[53] special and differential

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[52] Negotiating Group on Rules, *Fisheries Subsidies – Draft Consolidated Chair Text, Draft Disciplines on Subsidies Contributing to Overcapacity and Overfishing, and Related Elements*, at 1, TN/RL/W/277 (Dec. 21, 2023).

[53] *See id.* at 2 (Art. A of the Draft).

treatment[54] and notification and transparency obligations[55] associated with these subsidies, will be able to be added in the AFS at the 13th Ministerial Conference in February 2024. It also reserves a place for promulgating new types of subsidies, such as non-specific fuel subsidies.[56] This indicates that Members could continue to conduct in-depth negotiations to complete the AFS. Therefore, if Vietnam actively participates in these negotiations, Vietnam may better understand the new regulations, thereby making the necessary legal or institutional preparations to ensure that those regulations will be complied with and effectively enforced.

Fourth, fully complying with transparency regulations in FTAs as well as in the AFS of the WTO.

Full compliance with transparency obligations in FTAs or AFS (with, perhaps, new requirements added after the 13th Ministerial Conference) constitutes one of the vital factors ensuring Members' compliance with related obligations. This compliance can be used as a condition for granting assistance under the WTO Fisheries Funding Mechanism. For this reason, it can be seen that compliance with those obligations will bring significant benefits to Vietnam, showing the proactiveness and readiness of related states agencies and other stakeholders to contribute to solving global challenges and allowing Vietnam to receive all necessary assistance from the WTO and other international organizations to address concerns related to the implementation of its obligations under the AFS.

It seems worthy to note that the above difficulties or challenges do not constitute factors that will prevent Vietnam from ratifying the AFS as well as accepting the possible newly added disciplines. As in the case of participating in the Trade Facilitation Agreement,[57] Vietnam can use the AFS as a driving force to create pressures to carry out domestic reforms in this field, therefore, thereby achieving the goals of sustainable marine economic development in particular and sustainable development in general. Vietnam will most likely decide the ratification at an appropriate time and will comply well with its obligations when this Agreement enters into force.

[54] *See id.* at 3 (Art. B of the Draft).
[55] *See id.* at 4 (Art. C of the Draft).
[56] *See id.* at 5 (Art. D of the Draft).
[57] *See generally* Doan Thi Thanh Ha & Le Quang Lan, *Chapter 11: Trade Facilitation in Vietnam and Result of the ASFTI Basseline Study*, 8 ECON. RSCH. INST. ASEAN & EAST ASIA 142 (July, 2021).

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