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## I Introduction

Environmental protection, environmental awareness, sustainability; currently, these are ubiquitous concepts in regulation all over the globe, and international trade is not an exception.<sup>1</sup> In June, 2022, the 12<sup>th</sup> Ministerial Conference of the World Trade Organization ("WTO") adopted by consensus the Agreement on Fisheries Subsidies ("FSA"), which is the first instrument in the context of the WTO that directly addresses ocean sustainability by prohibiting harmful fisheries subsidies and, thus, meets SDG Target 14.6.<sup>2</sup> Since January this year, WTO Members have been progressively depositing their formal acceptances to the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization ("Protocol"), which contains the FSA and is incrementally approaching the quorum necessary to enter into force.

In this publication, we briefly refer to the history and current status of the Agreement (Section II), study some key provisions contained therein (Section III), and consider the way forward (Section IV).

## II History and Current Status of the Agreement

At the 11<sup>th</sup> Ministerial Conference, held in Buenos Aires between December 13 and 17, 2017, WTO Members agreed to:

*"continue to engage constructively in the fisheries subsidies negotiations, with a view to adopting, by the Ministerial Conference in 2019, an agreement on comprehensive and effective disciplines that prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to [illegal, unreported and unregulated]-fishing"*

- <sup>1</sup> See WTO, "The WTO and the Sustainable Development Goals", available at [https://www.wto.org/english/thewto\\_e/coher\\_e/sdgs\\_e/sdgs\\_e.htm](https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm), which discusses how international trade can help achieve sustainable development goals ("SDG"), such as SDG 1 (No Poverty), SDG 2 (Zero Hunger), SDG 3 (Good Health and Well-being), SDG 5 (Gender Equality), SDG 8 (Decent Work and Economic Growth), SDG 9 (Industry, Innovation and Infrastructure), SDG 10 (Reduced Inequalities), SDG 14 (Life Below Water), and SDG 17 (Partnership for the Goals).
- <sup>2</sup> Target 14.6 states "By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation" (<https://sdgs.un.org/goals/goal14>).

*recognizing that appropriate and effective special treatment for developing country Members and least developed country Members should be an integral part of these negotiations".<sup>3</sup>*

Under this mandate, a first draft was presented to WTO Members on May 11, 2021.<sup>4</sup> After multiple negotiations and the circulation of two revised drafts,<sup>5</sup> the final Agreement was adopted by consensus at the 12<sup>th</sup> Ministerial Conference, held in Geneva between June 12 and 17, 2022.

According to item 3 of the Ministerial Decision of 17 June 2022<sup>6</sup> and item 4 of the Protocol, attached to the aforementioned Ministerial Decision, the FSA would enter into force after two thirds of the 164 current WTO Members (i.e., 110) formally accept the Protocol. From January 2023, WTO Members started depositing their formal documents of acceptance with the WTO. During June 2023, the EU (June 7, which added the acceptance of 27 Members at once),<sup>7</sup> Nigeria (June 12),<sup>8</sup> and Belize (June 16)<sup>9</sup> have deposited their formal acceptances.

With this, the FSA has gathered about one third of the formal acceptances needed, and as acceptances continue being deposited, the more important it becomes to understand the FSA provisions before they enter into force.

### **III Content of the Agreement**

#### **1. Scope of Application**

The FSA "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" (Article 1 of the FSA).<sup>10</sup> Thus, the FSA extends the definition of "subsidy" contained in Articles 1 and 2 of the SCM Agreement, which require the existence of a financial contribution, benefit, and specificity. As stated above, FSA provisions apply to

<sup>3</sup> Ministerial Decision of 13 December 2017, WT/MIN(17)/64.

<sup>4</sup> Fisheries Subsidies. Draft Consolidated Chair Text, TN/RL/W/276.

<sup>5</sup> Negotiating Group on Rules – Fisheries Subsidies. Revised Draft Consolidated Chair Text, TN/RL/W/276/Rev.1; and Negotiating Group on Rules – Fisheries Subsidies. Revised Draft Text, TN/RL/W/276/Rev.2.

<sup>6</sup> WT/MIN(22)/33.

<sup>7</sup> WTO, "On World Oceans Day, DG Okonjo-Iweala welcomes EU acceptance of fishing subsidies agreement", available at [https://www.wto.org/english/news\\_e/news23\\_e/fish\\_08jun23\\_e.htm](https://www.wto.org/english/news_e/news23_e/fish_08jun23_e.htm).

<sup>8</sup> WTO, "Nigeria formally accepts the Agreement on Fisheries Subsidies", available at [https://www.wto.org/english/news\\_e/news23\\_e/fish\\_12jun23\\_e.htm](https://www.wto.org/english/news_e/news23_e/fish_12jun23_e.htm).

<sup>9</sup> WTO, "Belize formally accepts the Agreement on Fisheries Subsidies", available at [https://www.wto.org/english/news\\_e/news23\\_e/fish\\_16jun23\\_e.htm](https://www.wto.org/english/news_e/news23_e/fish_16jun23_e.htm).

<sup>10</sup> According to Article 2 of the FSA, "fishing" means "searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish", while "fishing related activities" means "any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea".

fishing and fishing activities at sea, and therefore, do not apply to aquaculture or fishing and fishing activities in inland waters.

## **2. Prohibited Subsidies**

One of the main features of the FSA is that it prohibits certain harmful subsidies.

### **(1) Subsidies Contributing to Illegal, Unreported and Unregulated Fishing**

The first category of subsidies prohibited by the FSA is subsidies contributing to illegal, unreported and unregulated ("IUU") fishing, or fishing activities in support of IUU fishing (Article 3.1 of the FSA). This prohibition applies after an affirmative IUU determination made by a coastal Member, a flag State Member, or a relevant Regional Fisheries Management Organization/Arrangement ("RFMO/A") (Article 3.2 of the FSA). When such determination is made by a coastal Member, it needs to comply with a series of procedural requirements, such as providing (i) timely notification of an investigation to the flag State Member or, if known, the subsidizing Member; (ii) opportunity to exchange information before a determination is made; and (iii) notification of a final determination and any sanctions (Article 3.3 of the FSA).

The subsidization prohibition shall remain in place for the longer period between (i) the duration of the sanctions imposed by a coastal Member, or (ii) as long as the subsidized vessel or operator is listed by an RFMO/A (Article 3.4 of the FSA).

### **(2) Subsidies Regarding Overfish Stock**

A second category of subsidies prohibited by the FSA is subsidies granted for fishing or fishing related activities regarding overfished stock (Article 4.1 of the FSA). "Overfished stock" means stock recognized as such by a coastal Member under whose jurisdiction fishing takes place or by a relevant RFMO/A, based on best scientific evidence available (Article 4.2 of the FSA). As an exception to this rule, in line with the sustainability objectives of the FSA, Members may provide subsidies or other measures that are granted for rebuilding overfished stock to a biologically sustainable level (Article 4.3 of the FSA).

### **(3) Other Subsidies**

Finally, the FSA generally prohibits subsidies granted for fishing or fishing related activities "outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant RFMO/A", that is to say, in the unregulated high seas (Article 5.1 of the FSA).

## **3. Special and Differential Treatment for Developing and LDC Members**

Echoing the mandate agreed at the 11<sup>th</sup> Ministerial Conference quoted above, item 4 of the Ministerial Decision of 17 June 2022 recognizes that "appropriate and effective special and differential treatment for developing country Members and least developed country Members should be an integral part of these negotiations". As materialization of such principle, the FSA contains several provisions that grant differential treatment to developing country and least developed country ("LDC") Members.

For instance, the FSA provides for a "peace clause", or "grace period" of two years from the entry into force of the FSA, during which subsidies granted or maintained by developing country or LDC Members within their own exclusive economic zones regarding IUU fishing (see section 3.2(1) above) or fishing of overfished stock

(see section 3.2(2) above), respectively, would not be subject to actions under Articles 3.1, 4.1, and 10 of the FSA (Articles 3.8 and 4.4 of the FSA). This means that, while developing country and LDC Members would not be exempted from the substantive obligations of the FSA, the aforementioned subsidies would not be subject to dispute settlement.

In addition, the FSA provides that technical assistance and capacity building would be available to developing country and LDC Members for the implementation of the Agreement, and establishes a voluntary funding mechanism for such assistance ("WTO Fisheries Funding Mechanism") (Article 7 of the FSA). The first country to donate for the WTO Fisheries Funding Mechanism was Japan,<sup>11</sup> followed by Canada, Germany, Australia, and the Netherlands.<sup>12</sup>

In a similar vein, Members "shall exercise due restraint in raising matters involving an LDC Member and solutions explored shall take into consideration the specific situation of the LDC Member involved, if any" (Article 6 of the FSA).

#### **4. Dispute Resolution**

According to Article 10.1 of the FSA, the WTO dispute settlement mechanism under Articles XXII and XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Dispute Settlement Understanding ("DSU") shall apply to disputes that arise under the Agreement.

In addition, Article 10.2 of the FSA states that Article 4 of the SCM Agreement "shall apply to consultations and the settlement of disputes under Articles 3, 4 and 5 of [the FSA]", while footnote 18 notes that the term "prohibited subsidy" in Article 4 of the SCM Agreement applies to subsidies prohibited under Articles 3, 4, and 5 of the FSA. Thus, the dispute settlement mechanism provided for prohibited subsidies under Article 4 of the SCM Agreement, including the consultation stage and referral of the matter to the WTO Dispute Settlement Body, shall apply to disputes concerning subsidies prohibited by the FSA.

#### **5. Outstanding Issues**

During the negotiations, various topics were discussed, and Members proposed or rejected the inclusion of provisions into the text of the FSA. For instance, Article 5 of the initial draft addressed subsidies contributing to overcapacity and overfishing (including, among others, subsidies for the construction, acquisition, or upgrading of vessels; subsidies for the purchase of fuel; and subsidies for personnel costs), but Members ultimately were not able to bridge their differences, and Article 5 was modified as explained above.<sup>13</sup> Notably, the United States proposed, during the negotiation process, the inclusion of language aimed at combating the use of forced labor in fishing vessels, for example, in the preamble, as a chapeau of Article 3, and among the transparency obligations under Article 8.2;<sup>14</sup> however, this proposal was not included in the drafts.

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<sup>11</sup> WTO, "Japan is first donor to WTO Fisheries Funding Mechanism", PRESS/918.

<sup>12</sup> WTO, "Canada donates CAD 1.4 million to WTO Fisheries Funding Mechanism", PRESS/924; "Germany provides first of a series of donations to the Fisheries Fund and offers expertise", PRESS/925; "Australia donates AUD 2 million to WTO Fisheries Funding Mechanism", PRESS/927; and "The Netherlands donates EUR 1 million to WTO Fisheries Funding Mechanism", PRESS/928.

<sup>13</sup> See Negotiating Group on Rules – Fisheries Subsidies. Report by the Chair, H.E. MR Santiago Wills to the Negotiating Group on Rules, TN/RL/35, paras. 16-19.

<sup>14</sup> In particular, the United States proposed including the following text:

Provisions on overcapacity and overfishing ultimately were not included into the FSA, as a "distillation process" was necessary to identify the "text that all [Members] could accept, by *temporarily* setting aside provisions where consensus had not emerged".<sup>15</sup> Such temporary setting aside implies that outstanding issues that could not be included in the text adopted on June 17, 2022, continue being negotiated, with a view of making a recommendation in the 13<sup>th</sup> Ministerial Conference, to be held in February 2024.<sup>16</sup> As testimony of the Members' real intention of continue negotiations, a termination clause was included, according to which the FSA shall be terminated if "comprehensive disciplines" on fisheries subsidies are not adopted within four years from the entry into force of the Agreement (Article 12 of the FSA).

## IV The Way Forward

The Agreement is an important milestone for the WTO, as it represents the first (i) WTO SDG target to be fully met, (ii) SDG target to be met through a multilateral agreement, and (iii) WTO agreement to focus on the environment.<sup>17</sup> While the WTO Members agreed to continue negotiations on comprehensive disciplines, Members have started depositing their formal acceptances to the FSA, which will enter into force as soon as it gathers acceptance from two thirds of the Members. In this regard, it is important to note that, under Article X:3 of the Marrakesh Agreement Establishing the World Trade Organization, when acceptance of two thirds of the WTO Members is obtained, the FSA will enter into force on that date for the Members that have already deposited their documents of acceptance, and will enter into force for other Members thereafter upon their own acceptance. Thus, the rights and obligations established by the FSA would not be applicable for non-accepting Members, even after the two-third acceptance quorum is reached; however, some reaction from the international community toward non-accepting Members could be expected, considering that the text of the FSA was adopted at the 12<sup>th</sup> Ministerial Conference by consensus.

At the same time, the WTO Members continue the negotiations about comprehensive disciplines on fisheries subsidies, including provisions that were contained in initial drafts of the FSA but were dropped during the "distillation process", such as subsidies contributing to overcapacity and overfishing.

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(i) In the preamble: "Recognizing that effective disciplines on and greater transparency of fisheries subsidies can contribute to Members' efforts to prevent and halt the use of forced labor on fishing vessels";

(ii) As a chapeau to Article 3: "Members recognize that the use of forced labor on fishing vessels is often associated with IUU fishing, and therefore that effective disciplines on subsidies to vessels and operators engaged in IUU fishing or fishing related activities in support of such fishing can contribute to Members' efforts to eradicate forced labor on fishing vessels"; and

(iii) Among the transparency obligations under Article 8.2: "Each Member shall notify the [Committee] in writing on an annual basis of: ... (b) any vessels and operators for which the Member has information that reasonably indicates the use of forced labor, along with relevant information to the extent possible".

<sup>15</sup> Negotiating Group on Rules – Fisheries Subsidies. Report by the Chair, H.E. MR Santiago Wills to the Negotiating Group on Rules, TN/RL/35, para. 11.

<sup>16</sup> See [https://www.wto.org/english/tratop\\_e/rulesneg\\_e/fish\\_e/fish\\_e.htm](https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm). (emphasis added)

<sup>17</sup> WTO, "The WTO Agreement on Fisheries Subsidies. What it does and what comes next", p. 1, available at [https://www.wto.org/english/tratop\\_e/rulesneg\\_e/fish\\_e/fish\\_factsheet\\_e.pdf](https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_factsheet_e.pdf).

While it is not possible to foresee a specific date when formal acceptance from two thirds of WTO Members would be obtained, we will continue monitoring the advances in the submission of formal acceptances, as well as in the negotiations of comprehensive disciplines on fisheries subsidies.

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