

# *Study on the International Law Aspects of the New WTO Fisheries Subsidies Agreement*

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**Abstract:** The overexploitation of global marine resources has led to a growing crisis in marine fisheries resources. Many countries and international organizations attribute the overexploitation and exploitation of fisheries resources to the incentives provided by some fisheries policies, such as fisheries subsidies. 2022 The Fisheries Subsidies Agreement (FSA) was finally adopted as a stand-alone agreement. The Fisheries Subsidies Agreement is the most significant outcome of the fisheries subsidies negotiations in 21 years, the first multilateral agreement reached by the WTO in the past nine years, and an important contribution to the realization of the United Nations 2030 Agenda for Sustainable Development. During the long negotiation process, although the relevant rules and interpretations were finally formed, there were still disputes among countries over specific concepts and determinations. For example, there are no clear provisions on the definition and identification of IUU fishing, and enforcement and remedies for the subsidy ban. This paper starts from the principles of feasibility, fairness and reasonableness of the IUU fishing subsidy ban, and combines the scope of the WTO subsidy negotiation authorization to expand the relevant theoretical contents of the Fisheries Subsidies Agreement in depth, to amend the limitations of the existing theories and to enrich the relevant knowledge system. Moreover, the new provisions, such as requirements for fisheries management and detailed notification of subsidies, will pose challenges for developing country members. Therefore, it is of great significance to understand the main contents of the Agreement on Fisheries Subsidies and to study the impacts of the Agreement on China and its response strategies, which will be conducive to the sustainable development of China's fisheries and oceans, and to the establishment of an international trade system for marine fisheries resources that is fair, reasonable and sustainable.

## **1. Introduction**

The development of global rules on fisheries subsidies has been one of the subjects of work of the WTO's Negotiating Group on Rules since 2001. In September 2015, in an effort to curb the continued deterioration of global fisheries resources, the UN General Assembly adopted Goal 14.6 of the 2030 Agenda for Sustainable Development which calls for "by 2020, banning certain fisheries subsidies that contribute to overcapacity and overfishing; eliminating fisheries subsidies that contribute to illegal, unreported and unregulated (IUU) fishing, and refraining from introducing new fisheries subsidies". The 2017 WTO Ministerial Meeting committed to

reaching a comprehensive and effective agreement on banning fisheries subsidies that contribute to overcapacity and overfishing and eliminating fisheries subsidies that contribute to IUU fishing in 2019. <sup>[1]</sup> In line with the UN Sustainable Development Goals set in 2015 and mandated by the 11th WTO Ministerial Conference in 2017, the core mandate of the fisheries subsidies negotiating process focuses on reaching agreement on rules to eliminate subsidies for illegal, unreported and unregulated fishing and to prohibit certain fisheries subsidies that contribute to overcapacity and overfishing, recognizing that special and differential treatment is an Indispensable part.

On 17 June 2022, the 12th Ministerial Conference of the World Trade Organization negotiated the Agreement on Fisheries Subsidies. In the negotiations, there is a big controversy on how to define the reduction of harmful subsidies and how to reduce the subsidies: firstly, the parties are concerned about the different contents of the fisheries subsidies negotiations. For example, prohibited subsidies should involve: IUU fishing vessel subsidies, overfishing (academic definition of overfishing, to whom overfishing should be reported and the negative impacts of overfishing), overcapacity subsidies involve some cross-cutting definitional issues, Special and Differential Treatment (SDT), negotiation mechanism, transparency and dispute settlement. Second, the parties have different views and positions on the cap-and-cover approach to fisheries subsidy reductions. Some countries' proposals focus on the issue of sensitive maritime boundaries, while some "fish-friendly" countries such as the United States, Australia, Argentina and Uruguay have proposed reductions in varying proportions according to the level of global marine catch, while many developing country members have put forward proposals that hold different positions. Third, what kind of fisheries subsidies disciplines should be implemented globally? The transparency of fishery subsidies notification by member states is low. Which subsidies need to be notified? For example, do government subsidies for infrastructure or fisheries management need to be notified? What kind of subsidy rules are to be established globally in the future, and which subsidies are beneficial and effective to comply with the rules? Is it possible to draw on the rules on domestic support in the Agreement on Agriculture to set an aggregate amount of comprehensive support, set ceilings for different types of subsidies, how to monitor the actual status of subsidies, and how to ensure that subsidy reductions are reasonable and fair? Fourth, how should "special and differential treatment" for developing countries be defined? There are significant differences in the structure of fisheries subsidies due to the different stages of development of developing and developed countries. At this stage, typical subsidies in developing countries are mainly used for fuel subsidies, fishing vessel construction, refrigeration, fishing gear, safety equipment, infrastructure support, fisheries management measures, etc., while fisheries subsidies in developed countries are mainly direct payments to public services such as infrastructure, research and development, and fisheries management measures to increase production capacity or reduce costs.

Negotiations culminate in consensus, China on June 27, 2023, transmitted its instrument of acceptance of the Protocol. <sup>[2]</sup>The conclusion of the Agreement not only contributes to the defense of multilateralism in the fishery industry, but also retains a certain policy space for China's offshore and pelagic fishing subsidies, which strongly protects China's rights and interests in development. This paper summarizes the relevant matters and main contents of the WTO Fisheries Subsidies Agreement, and puts forward relevant suggestions for the implementation of the Agreement on Fisheries Subsidies in China.

## **2. Key Elements of the WTO's New Fisheries Subsidies Agreement**

Illegal, unreported and unregulated (IUU) fishing has been recognized as one of the greatest threats to sustainable fisheries worldwide. <sup>[3]</sup>How to effectively prevent, stop and eliminate IUU fishing is the main element of the new WTO fisheries subsidies agreement. The Agreement has the following main disciplines and elements of subsidies: (1) Prohibition of subsidies for IUU fishing;

(2) Prohibition of subsidies related to overfishing; (3) Prohibition of subsidies for fishing in unregulated high seas areas; (4) Issues related to disputes over territorial and maritime jurisdictions; and (5) Issues related to special and differential treatment for developing countries; (6) On the fisheries management element of the Fisheries Subsidies Agreement.<sup>[4]</sup> I will discuss the above aspects.

## **2.1. Prohibition of subsidies for IUU fishing**

The Agreement prohibits the granting or maintenance of subsidies to vessels or operators engaged in IUU fishing or fishing activities related to supporting IUU fishing. IUU fishing not only undermines the management and measures of States and fisheries organizations that are working to conserve fisheries resources, but it also contributes to the deterioration of already fragile marine ecosystems.<sup>[5]</sup> The relevant subsidizer shall eliminate subsidies to operators or vessels engaged in IUU fishing if the fishing activity in question is determined to be IUU fishing and the determination meets the due process requirements set out in the Agreement. IUU fishing is defined as IUU fishing as defined in the Food and Agriculture Organization of the United Nations (FAO) 2001 Agreement on Preventing, Deterring and Eliminating Illegal, Unregulated and Unlawful Fishing and its Protocols. The activities listed in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. There are three scenarios for the identification of IUU fishing: first, by coastal members in areas under their jurisdiction; second, by flag States in relation to the activities of vessels flying their flag; and third, by regional fisheries management organizations or arrangements in the context of their area and species competence, including through the provision of timely notification and relevant information. IUU fishing is one of the greatest threats to marine ecosystems. The Agreement prohibits members from granting or maintaining subsidies related to IUU fishing and requires members to notify legislative and enforcement measures taken to that effect.<sup>[6]</sup> Coastal Members, Flag State Members and RFMOs may make IUU fishing determinations. With regard to the time limit for the implementation of the ban on IUU fishing subsidies, the Agreement provides that it should take into account the nature of the IUU fishing, its severity, and its recurrence, and should at least be equivalent to the duration of the sanction resulting from the determination that triggers the ban or the time limit of being listed by the RFMO/A, whichever is longer. In cases where a port state informs a subsidizing state that it has clear grounds to believe that a vessel in its port is engaged in IUU fishing, the Agreement provides that the subsidizing state shall give due consideration to the information received and take such action with respect to its subsidies as it deems appropriate.

## **2.2. Prohibition of subsidies related to overfishing of fish stocks**

The Agreement prohibits the granting or maintenance of subsidies for fishing or fishing-related activities on overfished stocks. Key elements include a prohibition on members granting or maintaining fishing subsidies related to stocks that are already overfished, and the ability of relevant coastal members and RFMOs to determine which stocks are overfished. If a stock is determined to be overfished, subsidies for fishing activities on that stock are prohibited. However, subsidies may be maintained where sustainable management measures are in place to rebuild the stock. With respect to overfishing determinations, the Agreement provides that the coastal State with jurisdiction over the area in which fishing occurs, the relevant RFMO/A in areas and species under its competence have the right to make such determinations, and requires that such determinations be made on the basis of the best scientific evidence available. With regard to biologically sustainable levels, these were those established by the coastal State having jurisdiction over the area in which the fishing or fishing-related activities took place, using reference points such as MSY or other reference points, and matched to the catch data available for that fishery; or by the relevant RFMO/A for the areas and stocks under its purview.

### **2.3. Prohibition of subsidies for fishing in unregulated high seas areas**

The Agreement provides that parties are prohibited from subsidizing fishing activities on the high seas that are neither under the jurisdiction of a coastal member nor under the jurisdiction of the relevant regional fisheries management organization. In addition, special care and appropriate restraint should be exercised when subsidizing vessels not flying their flag, or when subsidizing fishing or fishing-related activities for stocks of unknown status.

### **2.4. On territorial and maritime jurisdictional disputes**

In the WTO fisheries subsidies negotiations, issues such as territorial and maritime jurisdictional disputes have received extensive attention from Members. Particularly with respect to the IUU fishing subsidy ban, disputes over the determination of IUU fishing and the triggering of the subsidy ban can arise directly if the fishing activity takes place in waters subject to territorial or maritime jurisdiction disputes. This is particularly the case for IUU fishing. Determining whether a fishing activity is lawful begins with determining which national law applies to the waters in which the activity takes place, which in turn further affects the jurisdiction of the coastal state to recognize IUU fishing. The WTO should not be the venue for dealing with issues of territorial and maritime jurisdiction. Members have generally agreed that the WTO Fisheries Subsidies Agreement does not address issues of territorial and maritime jurisdiction and maritime delimitation. The Agreement provides that any findings, recommendations and results of arbitration relating to the Agreement shall not have any legal effect on territorial claims or on the delimitation of maritime boundaries. The Group of Experts established under the Agreement should not make findings on any claim based on any unilateral territorial claim or maritime boundary delimitation claim.

### **2.5. Special and Differential Treatment for Developing Countries**

Unlike the ban on subsidies that leads to overcapacity and overfishing, the IUU fishing subsidy ban's special and differential treatment for developing countries is largely due to the lack of management capacity in developing countries and the prevalence of a large number of small-scale fishing vessels and artisanal fisheries that are difficult to regulate effectively. The Agreement therefore provides special and differential treatment for developing members. Developed countries should shoulder their due responsibilities, and Article 7 of the Agreement on Fisheries Subsidies states that the WTO Fisheries Funding Mechanism should be established to provide targeted technical assistance and capacity-building to developing country members to help them implement the Agreement. Developed countries should abide by the Agreement and provide more assistance and support to developing countries so that they can transform their marine capture fisheries and get rid of their reliance on subsidies at an early date. Developing countries should actively make good use of the transition period, improve their domestic legal system as soon as possible, enhance their regulatory capacity, gradually reduce their reliance on marine fishing subsidies, help fishermen switch to other industries, and adjust the level of fishery fishing to a normal amount, so as to realize the long-term development of the marine environment. Within two years of the entry into force of the agreement, relevant subsidies provided by developing members will not be subject to the WTO dispute settlement procedure. And a fisheries fund aimed at providing technical assistance and capacity building support to developing members will be established.

### **2.6. On the fisheries management element of the Fisheries Subsidies Agreement**

First, fisheries management measures were included as part of the subsidy rules. The relevant rules include fisheries management elements such as the determination of IUU fishing, the determination of overfishing status of fish stocks, measures to conserve and rebuild fish stocks, and

conservation and management measures related to fishing areas as conditions for the application of the subsidy rules. The second is to enhance the transparency of policies related to fisheries management. In addition to submitting regular notifications of fisheries subsidies under the WTO Agreement on Subsidies and Countervailing Measures, members are required to provide information relevant to the implementation of the Agreement, including the type or species of fishing activity subsidized, a list of vessels and operators identified as engaging in IUU fishing; and, to the extent possible, the status of the fish stocks associated with the subsidized fishing activity, catch data, and fisheries management measures, Information on vessels benefiting from subsidies and other relevant information. Thirdly, cooperation with relevant international organizations in the field of fisheries is to be strengthened. The Agreement calls for enhanced cooperation with international organizations such as the Food and Agriculture Organization of the United Nations, regional fisheries management organizations and the International Fund for Agricultural Development.

### **3. Suggestions for China to respond to the WTO's new fisheries subsidies agreement**

China is considered to be the world's largest marine fishing production country, accounting for 15% of the global marine fishing production in 2018. <sup>[7]</sup>From the point of view of China's existing marine location conditions, the long coastline and the rich ocean current environment around the sea area bring great advantages for the development of marine fisheries. <sup>[8]</sup> China has always supported the effective regulation of fishery subsidies, and is also actively leading and constructively participating in the WTO fishery subsidies negotiations. <sup>[9]</sup> Among the recommendations on the issue of IUU fishing subsidy ban are as follows:

1) As the world's largest developing country, China should firmly uphold its status as a developing country, resolutely oppose the exclusion of China from the differential and special treatment of developing countries in the issue of fisheries subsidies, and actively fulfil its responsibilities and obligations.

2) A solid mechanism for fishery management personnel. As a strong maritime country, China relies heavily on fishery management personnel to strengthen the government's jurisdiction over maritime areas. Institutional guarantee is needed for the selection and appointment of managers and the training of their subsequent professional work capacity. The quality of management personnel directly determines the effectiveness of fishery management and fishery law enforcement. In addition, more learning opportunities should be provided for fishery scientists and fishery managers to learn from the experiences and lessons of other countries in marine resource management.

3) The Government should speed up the adjustment and reform of domestic fishery subsidies, change the original subsidy structure, which is dominated by production subsidies such as fishery fuel subsidies, and shift the objective of subsidies to promoting the conservation of fishery resources and the green development of the fishery industry, with subsidies focusing on the conservation of fishery resources and the protection of the environment, the safety and security of the fishery industry, fishermen's livelihoods, and the protection of fishery supervision and law enforcement. On the premise of sustainable development of the fishery industry, the relevant departments strictly control fishing intensity, conserve aquatic biological resources, vigorously develop ecological and healthy aquaculture, and improve the ecological environment of waters.

4) Active participation in international cooperation. On fishery issues, the most direct and effective way to safeguard national interests is to proactively participate in the existing rules framework system, and to fully reflect its own interests in the construction of new rules, so that they can maximize and meet its own situation and interests, and create a more flexible space for the development of the fishery economy. China must actively participate in the follow-up negotiations on fishery subsidies in the WTO, and strive to play a constructive role by continuously increasing its level of participation and improving its ability to participate.

5) Strengthen fisheries management and integrate fisheries into coastal zone management. The

Government actively promotes the rationalization of the fisheries economy, the improvement of traditional fisheries management techniques and the creation of economic incentives for sustainability. In recent years, a number of tools have emerged to create such incentives, two major examples of which are "rights-based management" and ecolabeling. Rights-based fisheries management (RBM) uses legal instruments or practices to create economically valuable private benefits in fishery resources. Creating economic incentives that favor sustainable practices is ecolabeling. China should therefore promote and strengthen fisheries management in terms of the sustainability of fisheries.

#### 4. Conclusions

The conclusion of the Agreement on Fisheries Subsidies has effectively implemented the relevant requirements of the United Nations sustainable development goals, revitalized the confidence of all parties in the multilateral trading system, and given impetus to the promotion of multilateralism and the advancement of the negotiating agenda of WTO in other areas. The entry into force of the WTO Agreement on Fisheries Subsidies is subject to the domestic procedures of Members, and it is difficult to tell when it will take place. In the Ministerial Decision adopting the Agreement, Members agreed to continue negotiations on the outstanding issues with the objective of "submitting proposals for additional provisions to the 13th WTO Ministerial Conference with a view to reaching a comprehensive agreement on fisheries subsidies". The Agreement stipulates that the above negotiations should be completed within four years from the date of entry into force of the Agreement, and that the main elements of the negotiations include the further development of disciplines on fisheries subsidies related to certain forms of subsidies that contribute to overcapacity and overfishing, while at the same time ensuring appropriate and effective special and differential treatment for developing and least-developed members. As an important supporter of the multilateral economic and trade system and a large fishery country, China should coordinate its domestic and international policies, actively participate in the formulation of international rules, and strive to realize the transformation of China's fishery industry, achieve green development, and promote the long-term sustainability of the fishery industry in the context of fishery reform.

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