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ORIGINAL ARTICLE

An Environmental Agreement in a Trade Court – Is the WTO's Agreement on Fisheries Subsidies Enforceable?

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Abstract
The 2022 Agreement on Fisheries Subsidies (AFS) is the culmination of over 20 years of negotiations within the WTO's Doha Development Round. Although it can be considered a small victory in the fight against declining fish stocks, the Agreement remains unfinished and underdeveloped. Of particular concern is the enforceability of the Agreement. While WTO Members recognize that the AFS was created to deal with a problem that has both socioeconomic and environmental implications, the Agreement relies on established WTO dispute settlement rules, which were created to resolve trade disputes. The paper assesses the difficulties of enforcing the AFS under these rules and considers additional provisions that could be included in subsequent negotiating rounds to ensure an effective and enforceable agreement. Recommendations cover different stages of the dispute settlement process and include alternative means of dispute resolution, measures to expedite proceedings, and retaliation procedures adapted to the AFS.

Keywords: World Trade Organization (WTO); Agreement on Fisheries Subsidies; dispute settlement; enforceability; retaliation; international subsidy rules

1. Introduction

The conclusion of a partial[1] World Trade Organization (WTO) Agreement on Fisheries Subsidies (AFS) after 21 years of negotiations has been lauded by some as a victory in the fight against declining fish stocks and illegal, unreported, and unregulated (IUU) fishing.[2] However, the issues left for further agreement are some of the most important and include harmful capacity-enhancing subsidies that contribute to overfishing and overcapacity, such as those for boat-building, modernization, and fishing inputs.

Another, and perhaps more insidious, problem is the enforceability of the AFS. In its current form, the Agreement ignores the fundamental disconnect between traditional rules of dispute settlement, which are set up to resolve trade disputes, and their applicability to environmental concerns

[1]In 2022, Members agreed to adopt some provisions of the AFS and open this first iteration of the Agreement for ratification (colloquially referred to as Fish 1), while continuing negotiations on the more contentious elements of the Agreement in order to finalise it at a later date (Fish 2).

[2]WTO (2023) 'Surge of Formal Acceptances of Agreement on Fisheries Subsidies – Entry Into Force Closer', www.wto.org/english/news_e/news23_e/fish_23oct23_e.htm#:~:text=The%20Agreement%20is%20a%20historical,fisheries%20subsidies%2C%20overcapacity%20and%20overfishing (accessed 1 December 2023); K. McVeigh (2022) 'First WTO Deal on Fishing Subsidies Hailed as Historic Despite "Big Holes"', IISD, www.theguardian.com/environment/2022/jun/21/first-wto-deal-on-fishing-subsidies-hailed-as-historic-despite-big-holes; IISD (2023) 'The WTO Agreement on Fisheries Subsidies: What It Means and Why It Matters', www.iisd.org/articles/policy-analysis/wto-agreement-fisheries-subsidies (accessed 1 December 2023).

such as fisheries sustainability. As explained below, this renders the AFS largely unenforceable, requiring a fallback on diplomacy and unilateral measures. This has consequences. As Palmeter et al. note, '(i)n addition to … formal disputes, considerably more trade concerns between WTO Members have been resolved because the Members are aware that a formal, binding, enforceable … system of dispute settlement is available if they cannot resolve their concerns informally'.[3]

Article 12 of the AFS is a sunset clause that requires Members to continue negotiating on outstanding issues and to 'adopt comprehensive disciplines' within four years of the entry into force of the current text. There appears to be political will to conclude negotiations in the near future,[4] but the agreement is not yet finalized. This presents an opportunity for Members to include additional provisions on dispute settlement that would improve the enforceability of the AFS.

The paper considers how the dispute settlement provisions of the AFS could be improved as part of the ongoing AFS negotiations. It first provides an overview of current WTO dispute settlement procedures affecting the AFS. Thereafter, the paper discusses the mismatch between current processes and an agreement focusing on fisheries sustainability, and the difficulties enforcing the AFS under this system. It concludes by suggesting future directions for negotiations.

2. Dispute Settlement Procedures and Subsidy Disputes

For many years, the WTO's dispute settlement body (DSB) was seen as a shining light in a multilateral trade system mired in longstanding and stalled negotiations. Under its dispute settlement system, WTO Members may not opt out of adjudication or block an unfavourable ruling. This system is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which applies to the majority of the WTO's covered agreements and allows for retaliation procedures (suspension of concessions or obligations under an agreement) if a Member is found to have contravened a covered agreement.

However, the WTO's dispute settlement system has flaws – most notably that its protections have historically been out of reach for certain WTO Members. Although large emerging economies bring disputes quite frequently, smaller developing countries face challenges in accessing the system, including a lack of expertise and resources, political ramifications, and the ineffectiveness of retaliation procedures when there are no significant imports or industries that the complainant country can target if retaliation is authorized. There have been attempts to address these problems, particularly the creation of the Advisory Centre for WTO Law (ACWL), which provides free legal advice and discounted rates for developing countries and least-developed countries (LDCs) in WTO dispute settlement processes. Nevertheless, these countries remain reluctant to launch disputes. To date, only one LDC has brought a case as a complainant,[5] and smaller developing countries appear primarily as third parties to disputes.

The vulnerability of the dispute settlement system to political pressure also became evident through the actions of the United States under the Trump administration. The continual blocking of Appellate Body appointments during this time left the dispute settlement system without an appellate function, which had traditionally acted as an important safeguard and standardizing mechanism. Although the United States offered a plethora of reasons for this action, including overreaching, overrunning time limits, and the Appellate Body viewing its judgments as binding precedent,[6] this step can be traced, at least in part, to the large number of Appellate Body

[3]D. Palmeter, P. C. Mavroidis, and N. Meagher (2022) *Dispute Settlement in the World Trade Organization*, 3rd edn. Cambridge University Press, 518.

[4]WTO (2024) 'Urgency of WTO Work on Fisheries Subsidies Spotlighted on Eve of World Oceans Day', www.wto.org/english/news_e/news24_e/fish_07jun24_e.htm (accessed 19 June 2024).

[5]Request for Consultations, *India – Anti-Dumping Measure on Batteries from Bangladesh,* WT/DS306/3, G/L/669/Add.1, G/ADP/D52/2, Mutually Agreed Solution notified on 20 February 2006.

[6]R.E. Lighthizer (2020) *Report on the Appellate Body of the World Trade Organization*, Office of the United States Trade Representative, 1–3.

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decisions that have gone against the United States.[7] The refusal to appoint or reappoint Appellate Body judges is not a new tactic by the United States, although previous administrations had not refused all appointments to the point of rendering the Appellate Body defunct.[8] The Biden administration has continued to refuse the appointment of new judges without dispute settlement reform, despite assurances of its intention to uphold the multilateral trading system.[9] Recent efforts to ensure a fully functioning dispute settlement system have proved unsuccessful, and the issue remained unresolved at Ministerial Conference 13 (MC13).[10] This has not prevented Members from appealing panel decisions, however.[11] These appeals 'into the void' render the dispute settlement system somewhat defunct, as these cases cannot be resolved at present.[12]

The accusation about overrunning is not unfounded, however. The large caseload of the Appellate Body in recent years has led to increased overrunning of time limits.[13] Moreover, many disputes drag on for decades as they face not only long time periods for decisions, but also multiple disputes on the same regulation. Subsidy disputes have been especially problematic, largely because of the sensitive nature of these measures.[14] Subsidies relating to food security, in particular, are delicate matters that States struggle to resolve – as evidenced by the 15 years it took for Members to agree to eliminate agricultural export subsidies,[15] and the 21 years required to pass a watered-down and incomplete agreement on fisheries subsidies. Indeed, subsidies disputes currently have one of the highest rates of non-compliance of all WTO disputes,[16] or compliance is partial or unsatisfactory.[17]

The irony of subsidies cases being some of the most difficult and time-consuming disputes at the WTO is that disputes involving prohibited subsidies are subject to special procedures under Article 4 of the Agreement on Subsidies and Countervailing Measures (ASCM) to reduce time periods for adjudication and withdrawal of a prohibited measure (Figure 1).

Disputes involving prohibited subsidies are also subject to special retaliation procedures under Articles 4.10 and 4.11 of the ASCM, which deviate from those in the DSU. Under Article 22 of the DSU, retaliation procedures must be authorized by the DSB and follow a set pattern. A Member must first suspend concessions or obligations within the same sector in which the

[7]Ibid., 3.

[8]S. Lester (2022) 'Ending the WTO Dispute Settlement Crisis: Where to from Here?', International Institute for Sustainable Development, IISD, www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis (accessed 16 September 2022).

[9]Ibid.

[10]13th Ministerial Conference of the WTO, 'Draft Ministerial Decision on Dispute Settlement Reform', WT/MIN(24)/W/22, 1 March 2024.

[11]Palmeter et al., supra n. 3, 405.

[12]Certain Members have attempted to resolve this by creating the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) under which Members agree to conduct appeals through arbitration under Article 25 of the DSU until such time as the Appellate Body is operating again. However, these procedures have not yet been used – Palmeter et al., supra n. 3, 402–404.

[13]Ibid., 354–355.

[14]Ibid, 269; Hyo-young Lee (2015) 'Remedying the Remedy System for Prohibited Subsidies in the WTO: Reconsidering Its Retrospective Aspect', *Asian Journal of WTO and International Health Law and Policy* 10, 450–451.

[15]10th Ministerial Conference of the WTO (2015) *Export Competition – Ministerial Decision of 19 December 2015*, WT/MIN(15)/45 WT/L/980, 21 December 2015. This Ministerial Decision covers one of the three pillars of the WTO negotiations on agricultural trade policy reform. Negotiations on the other two pillars – domestic support and market access – remain ongoing.

[16]Lee, supra n. 14, 425. This is likely because of a phenomenon noted by Vidigal – namely that when states see a measure as designed to fulfil an important social or public policy goal, they are less likely to withdraw the measure and more likely to amend it, which can lead to further litigation – G. Vidigal (2018) 'Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement', *Journal of International Economic Law* 20, 941–942.

[17]D.J. Townsend (2010) 'Stretching the Dispute Settlement Understanding: US–Cotton's Relaxed Interpretation of Cross-Retaliation in the World Trade Organization', *Richmond Journal of Global Law and Business* 9, 153–156; Lee, supra n. 14, 451.

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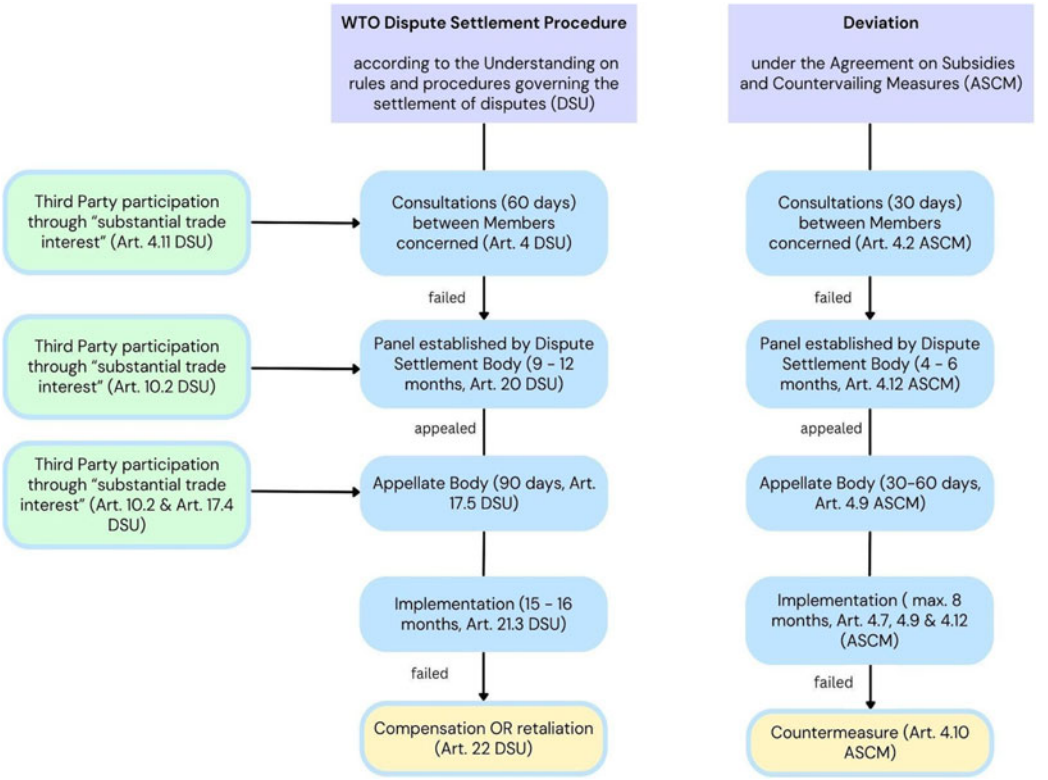

Figure 1. Dispute settlement procedures under the DSU and deviations under the ASCM.
Note: Figure created by the authors.

violation occurred. This applies to a complaint brought under the General Agreement on Tariffs and Trade (GATT), under which retaliation should target imports of goods in the same sector. If this would not be feasible or effective, a Member may apply for cross-sector retaliation under the same agreement or, failing this, cross-agreement retaliation (e.g., retaliation under the General Agreement on Trade in Services (GATS) or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) if the initial complaint was made under the GATT).

Article 22 of the DSU makes it clear that retaliation is not the preferred means of resolving disputes[18] and that the suspension of concessions or obligations:

> shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.

The amount of the retaliation awarded should also be 'equivalent to the level of the nullification or impairment'. Retaliation under the DSB has generally been seen as a means to induce compliance with the covered agreements, while ensuring that suspension of concessions is not unduly

[18]Article 22(1) of the DSU provides that 'neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements'. See also Appellate Body Report, *United States – Continued Suspension of Obligations in the EC–Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, para. 317, which noted that the suspension of concessions is a 'last resort'.

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prejudicial to the defendant Member.[19] In the first *EC–Bananas III* arbitration, it was noted that the temporary nature of retaliation 'indicates that it is the purpose of countermeasures to *induce compliance*' (emphasis in original).[20] However, the arbitrators also made clear that 'there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature' (emphasis in original).[21]

For prohibited subsidies, Article 4.10 of the ASCM requires that retaliation, in the form of countermeasures, be 'appropriate'. The ASCM does not define this term, providing only that it should not be interpreted to allow disproportionate countermeasures, and there has been some disagreement in the case law on how to calculate the amount (level) of countermeasures.

Several arbitrations brought under Article 4.11 of the ASCM have considered the meaning of 'appropriate' when determining the level of countermeasures. In *Brazil–Aircraft*[22] and *US–FSC*,[23] the arbitrators interpreted 'appropriate' to mean that the retaliatory amount must be high enough to be effective in ensuring that a prohibited subsidy is withdrawn, and relied on the value of the prohibited subsidy for this purpose rather than any adverse effects to the complainant. The arbitrator in *Canada–Aircraft* went further and awarded countermeasures in the amount of 120% of the subsidy, because of pronouncements made by Canada that it would not withdraw the subsidy.[24] The arbitrator in *US–FSC* noted that 'as far as prohibited subsidies are concerned, there is no reference whatsoever in remedies foreseen under Article 4 to such concepts as 'trade effects', 'adverse effects', or 'trade impact',[25] thus distinguishing it from Article 7 of the ASCM, which relies on adverse effects to the complainant.[26] This case also made it clear that flexibility is an important element when determining countermeasures, noting that 'countermeasures should be adapted to the particular case in hand'[27] and that the 'appropriate' test 'is in principle permissive of a range of possibilities'.[28]

In the most recent arbitration on this issue – the *US–Upland Cotton* arbitration – the arbitrator found that countermeasures under the ASCM should be seen as a temporary suspension of obligations,[29] and, while such measures should not be 'disproportionate' to the effects of the prohibited subsidy, they do not require strict equivalence.[30] Furthermore, the arbitrator noted that the term 'appropriate' requires that all the circumstances of a case be taken into account and denotes

[19]See Decision by the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ARB, 21 December 2007 (hereinafter Decision by the Arbitrator, *US–Gambling (2007)*), para. 2.7; Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU,* WT/DS27/ARC, 9 April 1999 (hereinafter Decision by the Arbitrator, *EC–Bananas III (1999)*), para. 6.3.

[20]Decision by the Arbitrator, *EC–Bananas III (1999)*), para. 6.3.

[21]Ibid, para. 6.3.

[22]Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 28 August 2000 (hereinafter Decision by the Arbitrator, *Brazil–Aircraft (2000)*), paras. 3.45–3.60.

[23]Decision of the Arbitrator, *United States – Tax Treatment for 'Foreign Sales Corporations', Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 20 August 2002 (hereinafter Decision by the Arbitrator, *US–FSC* (2002)), paras. 5.56–5.57.

[24]Decision by the Arbitrator, *Canada – Export Credits and Loan Guarantees for Regional Aircraft, Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement,* WT/DS222/ARB, 17 February 2003 (hereinafter Decision by the Arbitrator, *Canada–Aircraft (2003)*), para. 3.121.

[25]Decision by the Arbitrator, *US–FSC (2002),* para. 5.33.

[26]Ibid., paras. 5.33–5.34.

[27]Ibid., para. 5.12.

[28]Ibid., para. 5.13.

[29]Decision by the Arbitrator, *United States – Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, 31 August 2009 (hereinafter Decision by the Arbitrator, *US–Upland Cotton (2009)*), para. 4.42.

[30]Ibid., para. 4.104.

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a certain degree of flexibility.[31] However, the arbitrator also took the view that trade effects to the complaining party are material to the determination of the award even in the case of a prohibited subsidy.[32] While the presence of adverse trade effects did not impact a finding of whether the subsidy was prohibited or not, such effects *were* relevant to determining the level of countermeasures awarded.[33] Although not specifically referring to the ASCM, the first *EC–Bananas III* arbitration also weighed in on the difference between equivalence and appropriateness, finding that, while equivalence denotes a stricter standard of review, appropriateness still 'suggests a certain degree of relation between the level of the proposed suspension and the level of nullification or impairment'.[34]

Thus, while subsidies have something of a unique character within the WTO system, in practice the settlement of subsidy disputes does not appear to be markedly different from regular dispute procedures. Special time limits are not adhered to and, while the jurisprudence is contradictory, the most recent pronouncement on the matter of 'appropriate' countermeasures considers these as something very similar to 'equivalent to the level of the nullification or impairment', or at least requires countermeasures that are somewhat commensurate to the trade effects suffered by the complainant. This means that a complainant party may not be able to impose countermeasures when a defendant party has used a prohibited subsidy, if it has not personally suffered trade effects. This is particularly problematic when dealing with prohibited fisheries subsidies, which are often difficult to link directly to trade effects, as discussed further in Section 3.

Even if this strand of jurisprudence is not followed, the AFS will require something more to be rendered wholly enforceable and effective. Although subsidies are a trade matter, fisheries subsidies have a somewhat different character. They contribute to the depletion of fish stocks by inflating fishing capacity beyond what is sustainable. Thus, they affect not only the supply and cost of fish, but also its production. Consequently any agreement on fisheries subsidies is, as acknowledged by the WTO,[35] an environmental agreement, rather than one dealing purely with trade. It is this environmental character that raises problems in applying the current dispute settlement system to the AFS.

3. Factors Affecting the Enforcement of the AFS

Much like the proverbial fish out of water, the AFS sits uneasily within its new home when it comes to enforcement. While this paper does not take the view that the Agreement is completely unenforceable under current dispute settlement rules, there are a number of factors that limit its enforceability, and indeed the appetite of Members to implement enforcement procedures.

Under Article 10 of the AFS, ASCM Article 4 procedures on prohibited subsidies apply to Articles 3, 4, and 5 of the AFS, which respectively deal with subsidies to IUU fishing, overfished stocks, and other subsidies (in particular subsidies to high seas fishing outside of a relevant RFMO area). The DSU applies to all other provisions of the AFS, including notification, technical assistance, and flexibilities for LDC Members.

Problems with enforcement can be traced primarily to the nature of the AFS – an agreement seeking to address a problem that affects multiple states in the long-term but may not have direct trade effects in the short term. This means that Members may not want to institute proceedings at all, as the harm is too far removed to justify taking the drastic, and often detrimental, step of instituting proceedings and potentially retaliating against another Member.[36] The resources required, the political ramifications, and, if retaliation is authorized, the unpopular step of raising

[31]Ibid., paras. 4.46–4.47.

[32]Ibid., paras. 4.106–4.107.

[33]Ibid., para. 4.62.

[34]Decision by the Arbitrator, *EC–Bananas III (1999)*, para. 6.5.

[35]WTO (2023) Agreement on Fisheries Subsidies, WTO, www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm (accessed 1 December 2023).

[36]Jung and Jung reach a similar conclusion in the context of Article 20.16(5) of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), which corresponds to Articles 3 and 4 of the AFS in many respects – H. Jung and

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tariffs and thus prejudicing its own consumers, would give many Members pause if they are not likely to obtain any direct or immediate benefit. This is especially true for coastal developing countries, many of which maintain fisheries partnership agreements with the world's largest providers of harmful subsidies,[37] including China, the EU, Korea, Japan, Russia, and the USA.[38] Yet, from a food security and livelihood point of view, these are the countries most affected by stock depletion and unfair market competition in fisheries, exacerbated by the unequal distribution of fisheries subsidies.[39]

This also has an impact on remedies and retaliation. If, as stated in *US–Upland Cotton,* trade effects are material to the level of retaliation that can be authorized, and a non-compliant measure does not affect the trade of the complaining party, it will be challenging for a Member to retaliate effectively. This is the case even if the subsidy is prohibited and the AFS is breached to the detriment of fisheries sustainability. Even when a complainant party does suffer trade effects from the adverse measure, it may be difficult to prove a direct link between a fishing subsidy and harm to a complainant's trade. Subsidies for boat production or building of port infrastructure, for example, are often too far removed from the specific harm complained about to be seen as causally responsible for it, while processed fish products can be comprised of catches from different boats, including those flying the flags of different countries.

A further problem relates to the difficulty of securing compliance in disputes which cut to the heart of important societal policies.[40] These issues will certainly arise under the AFS, which deals with sensitive social concerns relating to food security, livelihoods, and poverty alleviation. This can result in long, drawn-out processes where Members are unwilling to withdraw, or fully withdraw, a measure.[41] Members may also exploit loopholes in the system, such as the lack of remedies for 'once-off' subsidies.[42]

In order to resolve these problems, it is prudent to first consider mechanisms that already exist within WTO agreements and jurisprudence that could be utilized and possibly adjusted to improve the enforceability of the AFS. Wherever possible, it is better to work with existing procedures, for the sake of continuity and predictability, as well as the immense difficulty that WTO Members have in finalizing and amending agreements. However, for the AFS to be wholly enforceable, Members will likely need to introduce dispute settlement measures specific to the AFS that account for its dual nature as both a trade and environmental agreement.

4. Applying Current WTO Enforcement Mechanisms to the AFS

4.1 Negotiated Compensation

As an alternative to retaliation, negotiated compensation is allowed under Articles 22(1)-(2) of the DSU. Compensation often takes the form of trade concessions, but monetary compensation is also possible.[43] However, compensation is difficult to negotiate and is hardly ever used.[44] This

N.R. Jung (2019) 'Enforcing 'Purely' Environmental Obligations Through International Trade Law: A Case of the CPTPP's Fisheries Subsidies', *Journal off World Trade* 53, 1014.

[37]D. Belhabib et al. (2015) 'Euros versus Yuan: Comparing European and Chinese Fishing Access in West Africa', PloS one e0118351; R. Nichols et al. (2015) 'Fishing Access Agreements and Harvesting Decisions of Host and Distant Water Fishing Nations', *Marine Policy* 54, 77; D. Tickler et al. (2018) 'Far from Home: Distance Patterns of Global Fishing Fleets', *Science Advances* 4(8).

[38]See estimates of harmful subsidy distribution in U. Rashid Sumaila et al. (2019) 'Updated Estimates and Analysis of Global Fisheries Subsidies', *Marine Policy* 109, 7.

[39]Ibid. for a clear representation of global inequities in the distribution of fisheries subsidies, see

[40]Vidigal, supra n. 16, 941–942. See too the discussion in Section 2 above.

[41]See, for example, the approach taken by the United States in *US–Upland Cotton*, discussed in Townsend, supra n. 17.

[42]Lee, supra n. 14), 441.

[43]B. Mercurio (2009) 'Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding', *World Trade Review* 8, 315–338.

[44]Ibid., 10–11; P.V. den Bossche and Z. W (2018) *The Law and Policy of the World Trade Organization*, 4 edn. Cambridge University Press, 204; Palmeter et al., supra n. 3, 467–468.

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is because trade concessions must be provided on a most-favoured nation basis and thus extended to all Member states.[45]

Monetary compensation may be a more promising avenue, although it is not without problems and may become a 'final remedy'.[46] In an agreement meant to protect the sustainability of fish stocks, this would allow countries with sufficient funding to pay for the privilege of overexploitation. This would not only undermine the purpose of the agreement but also cause significant damage to the interests of other Members, as fish stocks continue to deplete at the expense of food security, livelihoods, and economic stability. Thus, while monetary compensation is a possible alternative remedy available within the trade system, it is unlikely to be effective in fostering compliance with the AFS.

4.2 Cross-Retaliation

The retaliation provisions of the DSB require a Member to suspend concessions or other obligations under the same agreement (or in the same sector in the case of goods) in the first instance. Under the AFS, the concessions or obligations of Members primarily involve banning certain types of fisheries subsidies. Suspending obligations or concessions under the AFS would thus entail withdrawing a ban on fisheries subsidies in response to a violation of the Agreement. Apart from undermining the purpose of the AFS, such an action would affect other Members, not just the defendant, potentially leading to further disputes. As a particular fisheries subsidy rarely affects one State directly, the withdrawal of a ban is also unlikely to make a significant difference to the production or trade of fish in the non-complying State, at least not immediately. Thus, withdrawing a ban on fisheries subsidies as a means of retaliation would, in most cases, not be effective to induce compliance.

These problems could be resolved through the authorization of cross-retaliation, which allows a Member to retaliate under a different sector or agreement to the one that has been breached. It is a powerful tool within the WTO, which has agreements covering many trade-related topics, including goods, services, and intellectual property.

Cross-retaliation could also serve an important function under the AFS in enabling Members that primarily export fish and are not able to provide large fisheries subsidies (i.e., coastal developing States), to retaliate effectively if there is a breach of a ban on fisheries subsidies. This would help to level the playing field when it comes to the highly unequal global distribution of fisheries subsidies. At present, developed and large emerging economies are able to provide significant subsidies to their fishing industries, including funding large distant water fleets, while smaller developing States lack such funding, putting them at a competitive disadvantage on the global market. The effect of fisheries subsidies on the production of fish also means that these States suffer consequences that go beyond the economic, as depleting stocks affect food security, livelihoods of coastal communities, and national and regional security.[47] Coastal developing States thus have a significant interest in seeing the AFS enforced, and should be provided with the opportunity to retaliate if necessary. To this end, retaliation under the TRIPS Agreement has

[45]Report of the Appellate Body, *European Communities–Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, paras. 100–101.

[46]Mercurio, supra n. 43, 15–21; Lee, supra n. 14, 447–448.

[47]See, for example, I. Okafor-Yarwood (2019) 'Illegal, Unreported and Unregulated Fishing, and the Complexities of the Sustainable Development Goals (SDGs) for Countries in the Gulf of Guinea', *Marine Policy* 99, 418–419; A. Standing, *Corruption and State–Corporate Crime in Fisheries* (U4 Issue No. 15, 2015); D. Belhabib, U. Rashid Sumaila, and P. Le Billon (2019) 'The Fisheries of Africa: Exploitation, Policy, and Maritime Security Trends', *Marine Policy* 101, 87–88; K. Auld (2023) 'The Complex Nature of Fisheries Subsidies: Their Contribution to IUU Fishing and the Need to Balance Environmental and Social Priorities', in K. Auld et al. (eds.), *CAPFISH Project*, 2nd edn, Ministry of Oceans and Fisheries, Republic of Korea, World Maritime University, Korea Maritime Institute.

been authorized by the DSB in certain cases involving small developing countries[48] and was even authorized for Brazil in the case of *US–Upland Cotton*.[49]

Under Article 22(3) of the DSU, cross-retaliation is allowed only if the complaining party 'considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s)'. The criteria for suspension under a different agreement is even more challenging to meet – not only should suspension under the same covered agreement not be practicable or effective, circumstances must also be 'serious enough'. 'Practicable' has generally been interpreted as 'feasible' or available for use in practice – i.e. whether there is a sufficient level of trade to make suspensions under a certain sector or agreement possible.[50]

Effectiveness, as noted, is an important consideration when evaluating retaliation procedures, which should be able to induce compliance. Cross-retaliation has generally been authorized in cases where the trade between the parties under a specific sector or agreement is insufficient to allow for retaliation equivalent to the level of the nullification or impairment (or appropriate retaliation in the case of the ASCM). The potential harm to the suspending State is also a factor. In the second *EC–Bananas III* arbitration, the arbitrators stated that imbalances in economic power, whereby the suspension of concessions by a state highly dependent on imports would cause more harm to the party seeking suspension than the defending party, could be grounds for ineffectiveness of the suspension.[51] Similarly, in *US–Upland Cotton*, whether the complaining party would cause itself significant harm by suspending concessions on imports was material in considering whether the suspension would be effective.[52] The withdrawal of a ban under the AFS could cause harm to the withdrawing State, given the long-term implications for its fish stocks, although this would likely depend on the ban in issue and other contextual factors.

In the case of cross-agreement retaliation, Article 22(3)(c) further requires that circumstances be serious enough to warrant cross-retaliation, although in practice arbitrators often consider this as part of, or informing, the practicality and effectiveness analysis. In the second *EC–Bananas III* arbitration, the arbitrators considered that the factors listed in Article 22(3)(d) of the DSU provide 'at least part of the context' when considering this term.[53] These factors include the importance to the suspending party of trade under the sector or agreement in which a violation has been found, and broader economic considerations of the nullification and impairment and of the suspension of concessions or obligations. In *US–Gambling,* the arbitrator noted that whether circumstances are 'serious enough' should be considered on a case-by-case basis, but must at least reach 'a certain degree or level of importance'.[54]

As fisheries subsidies have socioeconomic implications, the broader economic concerns of fisheries subsidies to the suspending country could be considered, depending on the circumstances. However, environmental protection is certainly not a factor when considering if cross-retaliation is warranted, and nor is the broader effectiveness of the covered agreement. This is not surprising, as there was no need for such considerations in a dispute regime regulating trade agreements. As the WTO develops new agreements, however, particularly those created

[48]See, for example, Decision by the Arbitrator, *US–Gambling (2007);* Decision by the Arbitrator, *EC–Bananas III (2000).*

[49]Decision by the Arbitrator, *US–Upland Cotton (2009),* para. 6.5. However, this authorization did not cover the entire retaliation amount but only that part that exceeded imports of consumer goods from the US in a given year.

[50]Decision by the Arbitrator, *US–Upland Cotton (2009),* para. 5.142; Decision by the Arbitrators, *European Communities – Regime for the Importation Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU,* WT/DS27/ARB/ECU, 24 March 2000 (hereinafter Decision by the Arbitrator, *EC–Bananas III (2000)*), paras. 70–71.

[51]Decision by the Arbitrator, *EC–Bananas III (2000),* paras. 72–73. See also Decision by the Arbitrator, *US–Gambling (2007),* paras. 4.98–4.99, where a 'negative impact' for the local economy and the potential for economic disruption contributed to the finding that Antigua could not practicably or effectively suspend concessions under the GATS.

[52]Decision by the Arbitrator, *US–Upland Cotton (2009)*, para. 5.142.

[53]Decision by the Arbitrator, *EC–Bananas III (2000)*, para. 81. See also Decision by the Arbitrator, *US–Gambling (2007)*, para. 4.107.

[54]Decision by the Arbitrator, *US–Gambling (2007)*, para. 4.108.

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to deal with environmental and socioeconomic problems, it needs to address gaps in current dispute settlement processes which impede effective enforcement.

US–Upland Cotton interpreted the cross-retaliation provisions of the DSU expansively. In the context of prohibited subsidies provided by the United States for the export and domestic production of cotton, Brazil was required to retaliate against the United States by suspending concessions under the GATT. However, it was only required to do so for up to USD 409.7 million in consumer goods. Beyond this, the arbitrator deemed retaliation against exports from the United States to not be practicable or effective, despite the fact that Brazil's imports of consumer goods from the United States run into the billions. Cross-retaliation was thus authorized for any suspension over and above this amount.[55]

Thus, in respect of cross-retaliation, *US–Upland Cotton* could be said to favour compliance and efficacy of retaliation measures over a strict textual reading of the DSU.[56] At present, however, cross-retaliation provisions have not been tested in a case where trade volumes were not in issue. Certainly, the *US–Cotton* arbitration, while expansive on cross-retaliation, narrows the scope of Article 4 of the ASCM when it comes to the level of retaliation, focusing on trade effects rather than efficacy. This case has also received a certain amount of criticism for its loose interpretation of the cross-retaliation provisions.[57]

All of this creates a level of uncertainty that leaves the door open to arguments for same-agreement retaliation retaliation by a Member wishing to suspend its obligations under the AFS. Without a clear indication that cross-retaliation is necessary in the first instance under the AFS, barriers to its effective enforcement remain.

A loosening of the cross-retaliation provisions for developing countries has been proposed in the long-running DSU-reform negotiations,[58] which have been ongoing since 1994. Although the broader negotiations (absent the Appellate Body aspects) do not have much impetus to conclude at present,[59] this is a clear indication that Members are thinking about cross-retaliation as a solution where difficulties arise in enforcing compliance. Given the incoherent jurisprudence on the subject, the Appellate Body crisis, and the criticism of *US–Upland Cotton,* a legislative solution appears necessary. In the case of the AFS, its necessity is even clearer, given the difficulties and even absurdity of requiring same-agreement retaliation for violation of the provisions on prohibited subsidies.

4.3 Collective Participation and Retaliation

Another problem in enforcing the AFS stems from the expenses incurred in bringing a case and the nature of the retaliatory mechanism – namely that this mechanism is harmful not only to the non-conforming Member, but also to the retaliating Member. Thus, the retaliating Member should have adequate incentive to incur such costs. In the case where its trade is being damaged, the incentive is clear. However, where there is no immediate or direct harm to trade, these expenses are more challenging to justify, and States may be reluctant to impose retaliatory measures or to waste time and resources in bringing a challenge in the first place. This 'chilling effect' is similar to that which has prevented certain developing countries from instituting complaints.

[55]Decision by the Arbitrator, *US–Upland Cotton (2009),* paras. 5.182 and 5.201.

[56]Townsend, supra n. 17, 152.

[57]Ibid., 135–166.

[58]Report by the Chairman of the Dispute Settlement Body, *Special Session of the Dispute Settlement Body,* TN/DS/26, 30 January 2015 (hereinafter DSB Chair, *Special Session of the DSB* (2015)), 114–115; Report by the Chairman of the Dispute Settlement Body, *Special Session of the Dispute Settlement Body,* TN/DS/31, 17 June 2019 (hereinafter DSB Chair, *Special Session of the DSB* (2019)), 110.

[59]DSB Chair, *Special Session of the DSB* (2015), 114–115; DSB Chair, *Special Session of the DSB* (2019), 4–10; Report by the Chairman of the Dispute Settlement Body, *Special Session of the Dispute Settlement Body*, TN/DS/32, 17 November 2021.

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One way in which smaller developing countries have been able to participate in cases in which they have an interest is through the third party mechanisms in Articles 4 and 10 of the DSU (Figure 1). Under Article 10 of the DSU, a WTO Member with a 'substantial interest' may be joined to a matter before a panel and provide submissions. Requests to be joined in such proceedings have generally been approved in practice.[60] However, requests to join *consultations* under Article 4.11 of the DSU require a substantial trade interest, something which may be challenging to prove under the AFS.

Although the majority of the costs of bringing a case fall to the complainant party, the third party mechanism does allow for some spreading of resources, particularly when 'enhanced' third party rights are granted,[61] as third party submissions provide additional information and may help to clarify aspects of a case. Third parties are not allowed to retaliate in the event of a finding of non-compliance, however.

Members can also bring cases together as co-complainants. Article 9.1 of the DSU recommends that 'whenever feasible' a single panel should be established when multiple Members request the establishment of a panel on the same matter, and the Appellate Body has consolidated appeals from different panel reports where possible.[62] Such cases can save resources and multiple successful complainants may retaliate if the measure is not brought into conformity. However, it is uncertain whether *joint* or *collective* retaliation is permitted under WTO law.

Collective countermeasures have been utilized by States under certain circumstances, particularly in situations of occupation or human rights violations. When the International Law Commission's Draft Articles on State Responsibility were published in 2001, the commentary on Article 54 noted that State practice was limited and the issue was left to the further development of international law.[63] In a trade context, this development has been ad hoc and uncertain, and has thus far happened through arbitration.

In *Brazil–Aircraft*, the arbitrator took the view that, in cases where multiple Members institute proceedings with regard to a prohibited subsidy and countermeasures are authorized up to the amount of the subsidy, it would be possible to 'allocate the amount of appropriate countermeasures among the complainants in proportion to their trade in the product concerned.'[64] In *US–FSC*, the arbitrator did not agree, as it was felt that this would preclude one Member retaliating up to the full subsidy amount.[65] However, the arbitrator did state that in certain cases, allocation between Members might be possible. This would depend on the facts of the case, specifically whether 'the basis sought for countermeasures was purely and simply that of countering the initial measure (as opposed to, e.g., the trade effects on the Member concerned)'.[66] Unfortunately, the reasoning in *US–Upland Cotton* regarding the materiality of trade effects in deciding the level of retaliation does not leave room for such an approach.

Jung and Jung, who consider this problem in relation to the fisheries management and subsidy provisions in the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP), suggest using collective retaliation measures specifically in a trade and environment context. They propose a 'mandatory participation' model, where all parties to the agreement are required to participate in enforcing the judgment, to lessen the complainant party's burden. Alternatively, they suggest an 'autonomous participation' model, whereby parties would be given

[60]S. Lester, B. Mercurio, and A. Davies (2012) *World Trade Law: Text, Materials and Commentary*, 2nd edn. Hart Publishing, 190.

[61]Enhanced rights generally allow for increased participation by the third party in proceedings – see Palmeter et al., supra n. 3, 205–208.

[62]Ibid., 370.

[63]International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (A/56/10, 2001), art 54.

[64]Decision by the Arbitrator, *Brazil–Aircraft (2000)*, para. 3.59.

[65]Decision by the Arbitrator, *US–FSC (2002)*, para. 6.10.

[66]Ibid., para. 6.29.

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the right, rather than the obligation, to assist with retaliation.[67] While this is certainly an option to consider, it is debatable whether this would work in a WTO context, with 166 Member States needing to arrange collective retaliation procedures.

In the context of the DSU-reform negotiations, Members have mooted the possibility of collective retaliation for developing country Members that obtain authorization to suspend concessions. Proponents of the idea have suggested that a developing Member could approach another Member(s) to retaliate on its behalf in a situation where it is not able to retaliate itself.[68] Certain practical concerns were raised about this proposal, including what motivation a disinterested Member would have in retaliating on behalf of the developing country, particularly if this would harm its own industry.[69] This proposal would also be limited to developing countries, as a means of overcoming power imbalances in trade flows. This is different to the AFS, where the purpose of collective retaliation would be to share the burden of enforcing compliance when a subsidy does not have clear trade effects for the complainant Member(s).

What may be more feasible in the context of the AFS would be to allow third parties or co-complainants, which have an interest in the outcome of a case, the option to retaliate jointly with the complaining State or States, as suggested in the earlier arbitrations on prohibited subsidies. This would also accord with the proposals put forward by Members in the DSU-reform negotiations to expand the rights of third parties to participate in disputes[70] and to provide clear parameters regarding which Member States could be approached to retaliate together with, or on behalf of, another Member.

4.4 Retrospective Retaliation

A contentious remedy in the WTO dispute settlement system, and one on which there is little clarity in the DSU or ASCM, is retrospective retaliation. Retrospective retaliation would allow a Member to retaliate even after a measure has been withdrawn or its benefits have ended.

Under Article 22.8 of the DSU, 'the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed'. Article 4.10 of the ASCM provides similarly that if a recommendation is not followed within the specified time period 'the DSB shall grant authorization to the complaining Member to take appropriate countermeasures'. As noted, a number of cases have found that the purpose of retaliation is to induce compliance and, in the *US–Upland Cotton* arbitration, the arbitrator found that there was no legitimate basis on which to authorize Brazil's countermeasures regarding a period of non-compliance by the United States, as the measure was withdrawn before the authorization of countermeasures.[71] This was despite the fact that the request to authorize countermeasures was made before the United States withdrew the inconsistent measure.[72]

This is problematic on two fronts. Firstly, it encourages overrunning of time limits, as there is no incentive for States to comply with time periods for withdrawal of inconsistent measures. Provided they withdraw the measure before the conclusion of proceedings authorizing countermeasures, they will face no consequences for their actions. Secondly, it precludes any consequences in a case where a 'once-off' prohibited subsidy is used, as the subsidy would necessarily be withdrawn before countermeasures could be authorized.

[67]Jung & Jung, supra n. 36, 1018.

[68]DSB Chair, *Special Session of the DSB* (2015), 91–92 and 117–119; DSB Chair, *Special Session of the DSB* (2019), 110–111.

[69]DSB Chair, *Special Session of the DSB* (2015), 119.

[70]In particular, to provide for expanded third party rights in Article 22.6 Arbitrations – see DSB Chair, *Special Session of the DSB* (2015), 74–76; DSB Chair, *Special Session of the DSB* (2019), 110. On the expansion of third party rights more generally, see DSB Chair, *Special Session of the DSB* (2019), 13–18.

[71]Decision by the Arbitrator, *US–Upland Cotton (2009)*, para. 3.50.

[72]Ibid., para. 3.21.

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Certain prohibited subsidies may take the form of once-off subsidies for a particular purpose. There are a number of potentially harmful fisheries subsidies which may be once-off – e.g. boat-building subsidies, subsidies for the building of fisheries infrastructure, or vessel decommissioning schemes.[73] In such cases, and assuming the subsidy contravenes the AFS, there is no recourse under the current dispute settlement provisions and a Member can continue providing such subsidies without penalty, regardless of the detrimental effects on fish stocks.

In the *Australia–Leather* compliance dispute, the panel allowed for retrospective retaliation in the case of a once-off subsidy payment. Specifically in issue was the meaning of 'withdraw the subsidy' under Article 4.7 of the ASCM, which provides in relevant part that '(i)f the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay.' *Australia–Leather* dealt specifically with a once-off subsidy that had not been fully repaid once a finding of WTO-inconsistency was made and thus had not been 'withdrawn' according to the panel.[74] In an effort to differentiate ASCM Article 4.7 from Article 19.1 of the DSU, which uses the language 'bring the measure into conformity,' the panel found that the remedy provided for in Article 4.7 need not be limited to prospective action.[75] Furthermore, based on Article 3.2 of the ASCM, the panel reasoned that the ASCM establishes an 'absolute prohibition' on certain types of subsidies which a Member may 'neither grant nor maintain'.[76] Although this case was heavily criticized by Members[77] and has generally not been followed in subsequent cases,[78] this reasoning appears sound, particularly if there are to be consequences for utilizing prohibited subsidies in contravention of WTO law. As argued by Mavroidas, the judgment is in keeping with economic considerations, WTO precedent, and legal reasoning.[79] There were also some adherents to the Panel's approach amongst WTO Members.[80]

There has been some suggestion that the criticism of *Australia–Leather* revolved primarily around the use of retrospective *monetary* compensation (i.e., the idea that non-repayment of a prohibited subsidy could be seen as a failure to withdraw such subsidy),[81] rather than the idea of retrospective retaliation itself.[82] Certainly, much was made of the monetary aspect of the remedy in the DSB report, its unacceptable encroachment on national sovereignty, and destabilizing nature. However, Members also raised fears of opening the floodgates to disputes involving once-off subsidies, and Australia took the view that the remedy was 'of a punitive nature.'[83] Moreover, objections to retrospective retaliation stretch all the way back to the GATT era, when the United States refused to adopt reports that required it to reimburse anti-dumping duties in addition to

[73]Vessel decommissioning schemes may be beneficial for sustainability, but in many cases have not led to reduction of capacity in the fishing industry because there were no corresponding incentives to stop fishers returning to the industry or reduce fishing effort – see A. von Moltke, *Fisheries Subsidies, Sustainable Development and the WTO* (UNEP, Earthscan 2011), 38–46. As a result, they are classed by Sumaila et al. as 'ambiguous subsidies' – see Sumaila et al., supra n. 38, 4.

[74]Report of the Panel, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States,* WT/DS126/RW, adopted 11 February 2000 (hereinafter Report of the Panel, *Australia–Leather (2000)*), paras. 6.50–6.51.

[75]Ibid., para. 6.31.

[76]Ibid., para. 6.33.

[77]Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 11 February 2000, WT/DSB/M/75, 7 March 2000 (hereinafter DSB, Minutes of Meeting of 11 February 2000 (2000)), 5–9.

[78]Palmeter et al., supra n. 3, 453.

[79]P.C. Mavroidis (2000) 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', *European Journal of International Law* 11, 790.

[80]Hong Kong agreed that the Panel's approach was sound in the context of ASCM Article 4.7 – DSB, Minutes of Meeting (2000), 8.

[81]See Report of the Panel, *Australia–Leather (2000),* para. 6.48.

[82]Lee, supra n. 14, 445.

[83]DSB, Minutes of Meeting of 11 February 2000 (2000), 5.

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revoking its anti-dumping orders.[84] In *US–Upland Cotton*, Brazil was also careful to reject the notion that its request for a 'one-payment countermeasure' was for a retroactive remedy.[85]

Given the outcry about *Australia–Leather*, its begrudging adoption by the DSB with the caveat that it should not be followed in future panels, and strong Member opposition to retrospective remedies, a panel is unlikely to rule that a once-off subsidy is a violation of the AFS. This undermines the enforceability of the AFS when it comes to once-off subsidy payments and is an issue that should be addressed by Members in future iterations of the Agreement. The recent adoption of the AFS means that the floodgates argument does not carry much weight if retrospective remedies are limited to this Agreement. However, to ensure fairness and predictability, Members could also consider placing a statute of limitations on claims dealing with withdrawn subsidies.

4.5 Restraint Provisions

As yet, very little has been included in the AFS with regard to special and differential treatment (S&DT) for developing countries or small-scale fisheries. Although several draft negotiating texts with S&DT provisions have now been released,[86] it is not yet clear which parts of these texts, if any, will be incorporated into the final Agreement. What is clear, however, is that the regulation of fisheries subsidies cuts to the heart of government policy on poverty, food security, and development.[87] Thus, while it will be important to ensure that the dispute settlement system, including the regulation of countermeasures, is appropriately tailored to disputes under the AFS, it will also be necessary to ensure alternative means of dispute resolution for sensitive matters.

Under the DSU, there is a clear preference for resolving disputes amicably. Article 3.7 asks Members to exercise restraint and consider whether the procedures 'would be fruitful'. It notes that '(t)he aim of the dispute settlement mechanism is to secure a positive solution to a dispute' and that '(a) solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred'. Under Article 4, Members must enter into consultations prior to requesting the establishment of a Panel, and Article 5 allows Members to voluntarily undertake good offices, conciliation, and mediation processes during this time, which may be ongoing during the panel process. If no mutually agreed solution can be found, Article 3.7 makes it clear that the first priority is to ensure the withdrawal of a measure, thereafter to secure compensation if appropriate and, only as a last resort, to authorize suspension of concessions.

Restraint provisions are included throughout the DSU when it comes to developing and least-developed countries (LDCs). Amongst other provisions, Article 4.10 provides that Members 'should give special attention to the particular problems and interests of developing country Members'[88] during consultations, and Article 12.10 allows the time period for consultations to be extended in matters involving a measure taken by a developing country. Under Article 21 of the DSU, which deals with implementation of recommendations and rulings, the interests

[84]Mavroidas, supra n. 79, 778–779 – Mavroidas notes that the behaviour of the EC during this time appears to indicate its agreement with the US position.

[85]Decision by the Arbitrator, *US–Upland Cotton (2009)*, para. 3.5.

[86]Negotiating Group on Rules, *Fisheries Subsidies – Draft Consolidated Chair Text: Draft Disciplines on Subsidies Contributing to Overcapacity and Overfishing, and Related Elements*, TN/RL/W/277, 21 December 2023; Negotiating Group on Rules, *Additional Provisions on Fisheries Subsidies – Draft Text,* TN/RL/W/278, 12 April 2024 (hereinafter Negotiating Group on Rules, *Additional Provisions – Draft Text* (2024)). Negotiating Group on Rules, *Additional Provisions on Fisheries Subsidies - Draft Text,* TN/RL/W/279, 10 July 2024.

[87]The relationship between food security and harmful fisheries subsidies is particularly complex, as subsidies may improve food security and livelihoods in the short term while leading to food insecurity in the long term as fish stocks deplete. These effects also tend to be distributed inequitably, particularly in areas where distant water fisheries overfish stocks relied on by coastal communities.

[88]Developing countries are seeking to give this provision greater substance in the DSU-reform negotiations (e.g. making the language mandatory) – see DSB Chair, *Special Session of the DSB* (2019), 63.

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of developing country Members should be considered regarding measures subject to dispute settlement and, where the matter was brought by a developing country, further appropriate action can be taken in the circumstances. Article 24 provides that throughout the dispute settlement process, the special situation of LDCs should be taken into account and due restraint should be exercised in raising disputes and asking for remedies against LDCs. Furthermore, the Director-General or Chairman of the DSB must offer good offices, conciliation, and meditation on the request of an LDC before a panel request is made. Article 6 of the AFS provides that Members should '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'.

These provisions will go some way to addressing sensitivities in the AFS when it comes to developing countries and LDCs, although good offices, conciliation, and mediation processes are seldom used by Members.[89] However, the nature of the negotiations up until this point, the issues under negotiation, and the extreme sensitivity of certain matters suggest that more is needed to ensure compliance. For example, small-scale fisheries have been an element of the negotiations and may receive exemptions from subsidy bans in the final agreement.[90] The vulnerability of this group is well-established[91] and matters involving small-scale fisheries should certainly be subject to alternative dispute mechanisms and/or due restraint provisions. Disputes on other subsidies addressing social concerns, such as those for disaster relief or improvements in safety of fishing vessels, should also potentially be resolved in a less acrimonious forum.

At present, provisions in the DSU and ASCM are inadequate to deal with these circumstances, and the AFS will need to cater for these issues in its dispute settlement provisions. In certain cases, it is clear that alternative forums need to be utilized and creative solutions found to address some of the more sensitive issues raised by the AFS.

4.6 Plurilateral Trade Agreements

There has been much discussion during the negotiations about finding an alternative to a binding multilateral agreement, should WTO Members be unable to agree on certain controversial provisions. These suggestions include open plurilateral agreements concluded between part of the WTO Membership,[92] a Ministerial Decision or Declaration,[93] or commitments by Members to reduce subsidies in their schedules of concessions.[94] Likewise, it may be possible for such alternatives to address some of the concerns around enforceability of the AFS.

Ministerial Decisions and Declarations are not binding, which limits their efficacy as a means to improve enforcement of the AFS. Commitments in Member schedules are binding but retaliation in these circumstances would be firmly centred around trade effects,[95] which has already been established as an inappropriate remedy. A plurilateral agreement[96] is more promising, given that several regional trade agreements (RTAs) between WTO Members include provisions

[89]Palmeter et al., supra n. 3, 155.

[90]See, for example, Negotiating Group on Rules, *Fisheries Subsidies – Revised Draft Text*, TN/RL/W/276/Rev.2, 8 November 2021 (hereinafter Negotiating Group on Rules, *Fisheries Subsidies – Revised Draft Text* (2021)), art 5.4(b)(ii); Negotiating Group on Rules, *Additional Provisions – Draft Text* (2024), art B.4.

[91]K. Auld and L. Feris (2022) 'Addressing Vulnerability and Exclusion in the South African Small-Scale Fisheries Sector: Does the Current Regulatory Framework Measure Up?', *Maritime Studies* 21.

[92]B. M. Hoekman, P. C. Mavroidis, and S. Sasmal (2023) 'Managing Externalities in the WTO: The Agreement on Fisheries Subsidies', *Journal of International Economic Law* 26, 282; L. Bartels and T. Morgandi (2017) 'Options for the Legal Form of a WTO Agreement on Fisheries Subsidies', University of Cambridge Faculty of Law Research Paper, 12.

[93]Bartels and Morgandi, supra n. 92, 6–9.

[94]Ibid., 10–11; Hoekman et al., supra n. 92, 282.

[95]Bartels and Morgandi, supra n. 92, 11.

[96]Plurilateral agreements are decided between a subset of WTO Members, but are open to all Members. Under Article X(9) of the Marrakesh Agreement, such agreements may be added to the covered agreements if adopted by consensus by the Ministerial Conference.

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on fisheries subsidies. These include agreements of three or more parties (the CPTPP and the United States–Mexico–Canada Agreement (USMCA)), and bilateral agreements between developed countries (the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), the Free Trade Agreement between the UK and New Zealand, and the Free Trade Agreement between the UK and Australia). The CPTPP is an open agreement, with the UK officially acceding in 2023 and other countries (including large subsidy providers such as China, Korea, Thailand, and others) submitting applications or expressing interest in joining.[97]

The bans on fisheries subsidies in the majority of these RTAs are limited and largely reflect the AFS in its current state, rather than the comprehensive disciplines Members hope to reach in the ongoing negotiations. This can likely be traced to States' unwillingness to reduce the competitiveness of their fleets,[98] and hence the desire for a broad multilateral agreement. Article 22.9.6 of the UK–New Zealand FTA goes much further than the other RTAs in banning a range of harmful fisheries subsidies.[99] Yet, so little is spent on harmful subsidies in Oceania,[100] that New Zealand at least has everything to gain from an agreement that leads to a reduction in total global subsidies.[101] In contrast, Article 7.4 of CETA provides only that a party may 'express its concerns' and request consultations if it believes that a subsidy is adversely affecting its interest, while the other party shall 'use its best endeavours to eliminate or minimize the adverse effects of the subsidy'. Thus, any plurilateral agreement that attempted to include comprehensive disciplines would, as noted by others,[102] likely need to include all major subsidy providers to be acceptable to Members.

However, including only major subsiders in an open plurilateral agreement, while it would reduce pressure on fish stocks globally, would also have the unfortunate consequence of weakening incentives for other Members to eliminate harmful fisheries subsidies. Research by Skerrit and Sumaila[103] moves away from the idea of 'largest subsidy providers' by gross amounts provided, and calculates the provision of subsidies as a percentage of landed catch, fleet size, and EEZ size. When considered from this perspective, the distribution of subsidies is far more even, illustrating that smaller subsidized fleets can still undermine sustainability, food security, and livelihoods. Case studies focused on smaller providers such as Senegal[104] and Ghana[105] show the damage that can be done to coastal communities and fish stocks by supporting the creation and operation of large, motorized artisanal fleets.

From a dispute settlement perspective, certain of the RTAs (USMCA, UK–Zealand, and UK–Australia) include WTO-plus provisions requiring relevant expertise in environmental cases,[106] which is an important element in ensuring greater representation in the dispute settlement process. Fisheries in particular are a complex problem implicating environmental, economic, and social concerns, which should not be considered purely from a trade perspective.

[97]J.J. Schott (2023) 'Which Countries Are in the CPTPP and RCEP Trade Agreements and Which Want In?. Peterson Institute for International Economics', www.piie.com/research/piie-charts/which-countries-are-cptpp-and-rcep-trade-agreements-and-which-want (accessed 28 June 2024).

[98]D. J. Skerritt and U. Rashid Sumaila (2021) 'Broadening the Global Debate on Harmful Fisheries Subsidies Through the Use of Subsidy Intensity Metrics', *Marine Policy* 128, 104507, 1; L. Campling and E. Havice (2013) 'Mainstreaming Environment and Development at the World Trade Organization? Fisheries Subsidies, the Politics of Rule-Making, and the Elusive "Triple Win"', *Environment and Planning A* 45, 845–848.

[99]Including subsidies for the transfer of fishing vessels, and subsidies for operations or equipment that increase the ability of a vessel to find fish.

[100]Sumaila et al., supra n. 38, 7.

[101]See also Campling and Havice, supra n. 98, 844.

[102]See Hoekman et al., supra n. 92, 282.

[103]Skerrit and Sumaila, supra n. 98.

[104]Von Moltke, supra n. 73, 75–94.

[105]J. Tobey et al. (2016) 'Subsidies in Ghana's Marine Artisanal Fisheries Sector', USAID/Ghana Sustainable Fisheries Management Project (SFMP).

[106]For a full analysis, See Hoekman et al., supra n. 92, 276.

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Although the efficacy of these procedures in an RTA remains questionable, as the enforcement mechanisms of these agreements are rarely used,[107] their inclusion in a plurilateral agreement under the auspices of the WTO system would be more promising.

However, there are drawbacks to a plurilateral agreement amongst only the major subsidy providers. Part of the reason it is so important to assist all Members to institute dispute settlement procedures under the AFS, is the reluctance of large fisheries subsidy providers to hold others to account, lest they be targeted in turn.[108] If changes to the enforcement system happen only in a separate plurilateral agreement, then dispute settlement provisions in the current agreement remain unchanged. Apart from the confusion this could cause, the original agreement will remain largely unenforceable while signatories to the new agreement may be reluctant to enforce it.

It is worth noting that such caveats would not necessarily be applicable to future trade and environmental agreements, with much depending on context. Certainly, environmental WTO-plus provisions are increasingly being included in RTAs. In the case of fisheries subsidies, however, and particularly in light of the current state of the negotiations, utilizing such an agreement for enforcement purposes would be challenging and, as noted by Bartels and Morgandi, 'very much second-best as an alternative to a multilateral agreement'.[109]

5. Recommendations

The above analysis has shown that current mechanisms within the WTO system may assist to some extent in enforcing the AFS. Most of these options are not without problems, however, and some will not work without a generous interpretation of current WTO dispute settlement rules. It is likely then, that without some creativity on the part of Members in future negotiations, the AFS will be to some degree unenforceable.

The need to consider alternative mechanisms of enforcement has not gone unnoticed by WTO members. In 2017, Iceland, New Zealand, and Pakistan put forward a proposal suggesting that access to port facilities could be suspended for fishing vessels of a non-complying member, as an alternative form of countermeasures under the new Agreement.[110] In 2019, Canada proposed negotiation on a number of topics surrounding the issue of enforcement, noting that 'fisheries subsidies disciplines raise particular questions around dispute settlement, given that the WTO dispute settlement framework is geared towards ruling on and remedying trade effects, while fisheries subsidies disciplines also aim to address environmental effects'.[111] In 2021, the Chair of the Rules Group put out an Explanatory Note accompanying his revised draft text of 8 November, noting that when it came to the dispute settlement provisions 'suggestions have been made on a range of issues, from applicability of Article 4 of the SCM Agreement to remedies and countermeasures'. Although he stated the need for more focused discussions at this stage, these appear not to have materialized in the current version of the AFS. It can only be hoped that this is one of the issues that has been tabled for further discussion.

To facilitate this, provisions which could improve the enforceability of the Agreement are explored, utilizing and expanding on the suggestions made by Members, the academic literature,

[107]Vidigal, supra n. 16; C. Chase and others, 'Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements–Innovative or Variations on a Theme?', World Trade Organization Staff Working Paper No. ERSD-2013-07, 2013), 46–49.

[108]Hoekman et al., supra n. 92, 278; Young, M. A. (2009) 'Fragmentation or Interaction: The WTO, Fisheries Subsidies, and International Law', *World Trade Review* 8, 477–515.

[109]Bartels and Morgandi, supra n. 92, 12.

[110]Negotiating Group on Rules, *Proposed MC11 Fisheries Subsidies Disciplines: Implementing DSG Target 14.6, Communication from Iceland, New Zealand and Pakistan*, TN/RL/GEN/186, 27 April 2017, 3.

[111]Negotiating Group on Rules, *Dispute Settlement in a WTO Fisheries Subsidies Agreement: Discussion Paper, Communication from Canada*, TN/RL/GEN/198, 21 May 2019 (hereinafter Negotiating Group on Rules, *Communication from Canada* (2019)).

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and the discussion in Section 4. The analysis consists of three parts, considering issues that arise before, during, and after the dispute settlement process. These recommendations are summarized in Table 1.

5.1 Pre-Dispute Settlement

When it comes to pre-dispute settlement procedures, it is important to address a problem that may prevent the institution of disputes altogether, even when a Member has clearly violated the prohibited subsidy provisions of the AFS to the detriment of fish stocks; namely that a Member's trade interests may not be directly affected by a particular measure. This provides little incentive for it to bear the costs to litigate and enforce a dispute. If Members do not choose to enforce the AFS, the efficacy of the Agreement is questionable. There are several ways to address this problem.

Firstly, collective retaliation by parties and third parties to a dispute should be authorized, to prevent the full burden of retaliation falling on the Member bringing the claim. While collective retaliation should be carefully structured to avoid duplication and allegations of using the process to exact retribution on the non-complying country, it would help to share the load for a problem that requires multilateral action if it is to be addressed effectively. As discussed in Section 4, there is judicial precedent and Member interest in collective retaliation procedures, with many proposals put forward within the context of the ongoing dispute settlement negotiations.

This only addresses one aspect of the problem, however, as the costs of litigating the dispute still fall to the complainant party or parties. In addition to the assistance provided by the ACWL, there may be scope to expand the mandate of the Fisheries Funding Mechanism, set up to assist developing Members to implement the AFS. This will improve the ability of States, particularly coastal developing States which have an interest in holding large subsidy providers to account, to bring disputes or to participate as third parties in such matters.

A second avenue would be to bypass traditional dispute settlement procedures altogether. In its 2019 submission to the Rules Group, Canada suggested that there may be a need to consider alternative methods of dispute settlement and whether certain issues should be subject to dispute settlement at all. Issues beyond the scope of review would primarily be determinations of stock status and other technical aspects of fisheries management, although Canada also raised the issue of IUU fishing determinations.

There is precedent for placing issues beyond the scope of review in agreements that deal with technical matters, such as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement). The Anti-Dumping Agreement has specific provisions on dispute settlement and Article 17.6 provides that as long as the domestic authorities' establishment of facts was proper and their evaluation thereof unbiased and objective, this evaluation cannot be overturned by a panel. Although not specifically dealing with dispute settlement, Articles 3.1–3.2 of the SPS Agreement provide that where Members' sanitary and phytosanitary measures conform to international standards, guidelines, or recommendations, they 'shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994'. This does not put such measures beyond the scope of review but it does create a rebuttable presumption of consistency with WTO law.[112] This provides a certain amount of security for Members and reduces the burden of proving that a measure is WTO-consistent. Similar provisions could be included in the AFS.

[112]Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R; WT/DS48/AB/R, adopted 13 February 1998, para. 170.

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Table 1. Recommendations to improve the enforceability of the AFS

Stage of dispute settlement	*Problem*	*Recommendation*
Pre-Dispute Settlement	Little incentive to enforce the AFS if prohibited subsidies do not directly affect Members' trade interests.	Allow for collective retaliation among all WTO Members or parties to a case (including third parties).
	High costs of instituting litigation in the WTO, especially for developing countries and LDCs, which often suffer disproportionately from the effects of fisheries subsidies.	Expand the mandate of the current Fisheries Funding Mechanism to assist developing countries and LDCs to enforce the AFS.
	Conventional dispute settlement procedures may be inappropriate to adjudicate sensitive matters and complex scientific determinations in the AFS, leading to non-compliance.	Provide for alternative means of dispute resolution, place certain matters beyond the scope of review, and extend 'due restraint' provisions for LDCs to other low-income developing countries (e.g., the SVEs).
Dispute Settlement	Long-running disputes in subsidies matters are problematic in cases of environmental urgency.	Expedite proceedings under the AFS through alternative dispute settlement processes or innovative mechanisms like interim orders or penalties.
	No mandatory requirement to seek scientific advice, despite the need for scientific determinations under specific AFS provisions, e.g. Article 4.	Mandatory consultation, consulting international organizations with a fisheries mandate, allowing disputing Members to consult experts, or the creation of a standing expert body (e.g., under the Committee on Fisheries Subsidies).
	Trade-centric and non-inclusive dispute settlement provisions diminish the possibility for remedies and compliance procedures to adopt a holistic and balanced approach to trade and environment.	Include fisheries experts and stakeholders as expert advisors in dispute settlement processes, including mandatory consultation on sensitive matters; develop guidelines for clearer and more transparent consultation processes for enforcement of trade and environment agreements.
Post-Dispute Settlement	DSU rules that require retaliation under the same agreement, unless circumstances are serious enough, undermine the purpose of the AFS.	Always allow for cross-retaliation in the first instance under the AFS.
	Difficulties showing direct trade effects in cases involving fisheries subsidies make it challenging to determine the level of retaliation.	Allow for arbitrator flexibility in imposing remedies. Potential grounds for determining the level of retaliation could be harm to the environment or the costs of rehabilitation (including social rehabilitation).
	Potential for punitive remedies when determining a level of retaliation that is not based on trade effects.	Remedies could focus on direct assistance with fisheries management, rehabilitation of the environment, or social projects for fishers. Port state measures could also be considered.
	Many fisheries subsidies are once-off payments, which attract no consequences under current WTO mechanisms.	Allow for retrospective remedies, limited and tailored to the AFS (e.g., remedies that focus on reversing harm, such as environmental rehabilitation).

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Thirdly, the new Fisheries Subsidies Committee (created by Article 9 of the AFS), or an expert group acting under its auspices, could be utilized in a similar manner to the compliance committees established under multilateral environmental agreements (MEAs). Compliance committees assist state parties to implement and comply with agreements and provide an alternative to dispute settlement procedures, which are often fairly weak in MEAs. This would be in line with the new Committee's mandate to review the implementation and operation of the AFS, and would provide an alternative to dispute settlement when matters are sensitive or inappropriate for formal dispute resolution processes. As the Committee is also enjoined by Article 9.5 of the AFS to 'maintain close contact' with the FAO, RFMOs, and other relevant organizations dealing with fisheries management, expert assistance would be available to resolve non-compliance in certain cases. Matters involving small-scale fishers and other sensitive social issues would also be better resolved in an alternative forum.

There may further be scope to extend the 'due restraint' provisions currently provided for LDCs to other groups of low-income developing countries, such as the small and vulnerable economies group, predicated on metrics such as total marine capture or total subsidies provided. Similar conditions have been proposed for reliance on subsidy exemptions, and are now well-established in the negotiations as a means to exempt smaller parties from some of the more onerous provisions of the AFS.[113]

5.2 Dispute Settlement

There are several problems that could arise in litigating a dispute under the AFS using traditional dispute settlement mechanisms. First is the problem of long, drawn-out disputes that take years or even decades to resolve. Despite the ASCM attempting to expedite prohibited subsidy disputes, these provisions have generally been ineffective. Finding ways to speed up proceedings will be extremely important under the AFS, given the potentially irreversible environmental harm caused by long delays in the resolution of disputes. Alternative dispute settlement processes could assist in resolving some of these problems. When cases do go to a panel process, however, innovative mechanisms will be necessary within the scope of (and limited to) the AFS.

Although potentially unpalatable, the introduction of penalties at certain stages of the process could prove effective in promoting compliance with time periods and the implementation of recommendations. Non-compliance penalties have been proposed in the DSU reform negotiations; for example, including the 'reasonable period of time' to bring a measure into compliance in the calculation of the level of retaliation.[114] Administrative penalties have also been suggested, including removing the ability to preside over WTO bodies or access the WTO Members website.[115] Similar penalties could be proposed in the AFS negotiations. For such penalties to be feasible, however, difficulties faced by certain developing countries in adhering to time limits, such as lack of personnel or resources, would have to be taken into account.

Alternatively, Members could draw inspiration from municipal law systems and consider something akin to an interim interdict, which would halt the provision of the alleged prohibited fisheries subsidies to prevent further environmental degradation pending the outcome of the dispute. Given that there is no standing panel at the WTO, it would not be possible to bring an urgent application as in municipal law systems. However, a panel constituted to hear a dispute could be given the power to halt such a measure temporarily, as part of a special procedure within

[113]See, for example, the negotiating draft texts released prior to MC13 and the adoption of the AFS – Negotiating Group on Rules, *Fisheries Subsidies – Draft Consolidated Chair Text* (2023), art B.2; Negotiating Group on Rules, *Fisheries Subsidies – Revised Draft Text* (2021), art 5.4(b)(i).

[114]DSB Chair, *Special Session of the DSB* (2019), 61.

[115]Ibid., 111–112.

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the broader case and based on clear and precise guidelines, such as the presence of *prima facie* evidence of irreversible harm.

A second issue, as noted by Canada, is that certain of the new provisions in the AFS require scientific determinations. This is particularly true for Article 4, which prohibits subsidies to overfished stocks, except those provided for the purpose of rebuilding stocks to biologically sustainable levels. Specifically, Canada's submission asks whether Article 13 of the DSU, which provides for panels to seek expert advice regarding scientific and technical matters, would be sufficient in this case or if further procedures are necessary.[116] Currently, this provision is discretionary, and does not require panels to seek expert advice.[117] Canada gives some suggestions in this regard, including enjoining panels to seek advice on these issues,[118] consulting international organizations with a fisheries mandate, or disputing Members agreeing on expert(s) that the panel could rely on in a particular case.

Another option could be to create a standing expert body akin to the Permanent Group of Experts that advises the SCM Committee on subsidies. As the AFS has established a Committee on Fisheries Subsidies, an expert body could operate under its auspices and provide assistance to the Committee as well as panels during a dispute. Given the need for alternative dispute resolution on certain issues and the fact that some matters are not apposite for dispute settlement, this group could also be invaluable in working with Members to restructure their fisheries subsidies programmes so that disputes could be resolved in a consultative and non-acrimonious manner.

Thirdly, and relatedly, there is the question of broadening the involvement of relevant stakeholders in dispute settlement proceedings. Many of the difficulties identified in enforcing the AFS relate to its status as an environmental agreement in a trade court, and the narrow, trade-focused elements of that system allowing very little scope for creativity. Greater collaboration and cooperation with actors within the fisheries regime would undoubtedly lead to more equitable outcomes that take a holistic view of a complex problem involving multiple regimes.

Management of fisheries raises difficult questions around food security, livelihoods, sustainability, safety, trade, and the need to enforce fisheries regulations and combat illegal activity, all of which must be balanced against each other. Trends towards holistic and inclusive management are reflected in the increasing adoption of ecosystem approaches to fisheries management,[119] co-management of resources with fishers and fishing communities,[120] and collaborative efforts to address IUU fishing and related problems.[121]

[116]Negotiating Group on Rules, *Communication from Canada* (2019), 1–2.

[117]Reports of the Appellate Body, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging,* WT/DS435/AB/R; WT/DS441/AB/R, adopted 29 June 2020, para. 6.235; Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998 (hereinafter Report of the Appellate Body, *US–Shrimp (1998)*), para. 104; Report of the Appellate Body, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, para. 84.

[118]This may be something akin to Article 11.2 of the SPS Agreement, which states that panels *should* seek expert advice on scientific or technical issues, although whether this provision is considered mandatory is unclear from the case law.

[119]M. Vasconcellos and V. Ünal (2022) 'Transition towards an Ecosystem Approach to Fisheries in the Mediterranean Sea: Lessons Learned through Selected Case Studies', FAO Fisheries and Aquaculture Technical Paper, 681; S. Gelcichet al. (2018) 'Assessing the Implementation of Marine Ecosystem Based Management into National Policies: Insights from Agenda Setting and Policy Responses', *Marine Policy* 92, 40–41.

[120]FAO, Duke University and WorldFish, *Illuminating Hidden Harvests – The Contributions of Small-Scale Fisheries to Sustainable Development.*, 2023, 191–210.

[121]K. Auld et al. (2023) 'The Collective Effort of the United Nations Specialised Agencies to Tackle the Global Problem of Illegal, Unreported and Unregulated (IUU) Fishing', *Ocean & Coastal Management* 243, 106720; F. Blaha (2022) 'IUU Fishing and the Pacific Islands Tuna Fishery – Reality and Challenges', in F. Neat et al. (eds.), *CAPFISH Project: Capacity-Building Project to Progress the Implementation of International Instruments to Combat IUU Fishing*, 1st Edition. Ministry of Oceans and Fisheries, Republic of Korea, World Maritime University, Korea Maritime Institute.

The AFS reflects some elements of the international fisheries regime, through references to fisheries instruments such as the FAO International Plan of Action for IUU fishing (IPOA-IUU), reliance on IUU determinations by RFMOs, and a role for the FAO and the International Fund for Agricultural Development in the administration of the Fisheries Funding Mechanism. However, such elements are not included in the provisions on dispute settlement, reinforcing the idea that trade interests should be front and centre when enforcing the agreement, despite its purported environmental character.

Informal interactions between WTO Members and external organizations such as WWF and UNEP took place during the negotiations,[122] and the Appellate Body has taken account of international environmental law to interpret WTO provisions in dispute settlement processes.[123] However, WTO jurisprudence on this issue has been inconsistent,[124] and accusations levelled at the Appellate Body for overstepping its role may constrain the type of 'evolutionary' interpretation found in cases such as *US–Shrimp*.[125] Formally involving other actors in dispute settlement processes under the AFS would provide much-needed clarification, as well as a multifaceted perspective on issues such as remedies or amicable resolution of sensitive disputes.

There are various ways in which this could occur. Should an expert body be established under the Committee on Fisheries Subsidies, this would ideally be comprised of experts nominated by Members, as well as experts from the secretariats of international or regional organizations such as the FAO, UNEP, or RFMOs. Mandatory involvement of experts in cases involving sensitive social matters would also be advisable. It will be particularly important to include fishers or fisher organizations as experts in disputes affecting them, given the use of co-governance arrangements in many Member countries.

Suggestions to this effect have been made during the negotiations,[126] and the involvement of external organizations in the administration of the Fisheries Fund suggests that Members may be open to consultation of a broader range of actors in dispute settlement processes. However, there has also been reluctance to involve outside actors in review processes.[127] Implementing oversight and transparency mechanisms could help to alleviate fears of giving external actors too great a role in review processes.[128] Ensuring that such determinations are advisory, rather than binding, should also make such arrangements more palatable to Members.

As such concerns are not limited to the AFS or the fisheries regime, it would be useful if guidelines could be developed on consultation and representation of relevant stakeholders in trade and environment processes, either by the WTO Secretariat or the Committee on Trade and Environment. Important considerations would be Member consultations with local and

[122]M.A. Young (2011) *Trading Fish, Saving Fish: The Interaction between Regimes in International Law*, Cambridge Studies in International and Comparative Law. Cambridge University Press, 112–113; Negotiating Group on Rules, *WTO Disciplines on Fisheries Subsidies: Elements of the Chair's Draft: Communication from New Zealand*, TN/RL/W/218, 21 February 2008.

[123]Young, supra n. 122, 189–240.

[124]Ibid., 202–204.

[125]In this case, the Appellate Body referred to UNCLOS, CITES and other environmental agreements in deciding that the term 'exhaustible natural resources' in Article XX(g) of the GATT could apply to living, and thus potentially renewable, natural resources – Report of the Appellate Body, *US–Shrimp (1998)*, paras. 129–134.

[126]See, for example, Negotiating Group on Rules, *Fisheries Subsidies: Framework for Disciplines – Communication from Japan, the Republic of Korea, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu,* TN/RL/GEN/114/Rev.2, 5 June 2007, 9, which suggested that representatives from community fishery management groups could be invited to give expert advice to a WTO panel. Mandatory consultation was also suggested by Canada in the context of scientific determinations, as discussed above.

[127]For a full discussion, see K. Auld (2021) 'Sustainable Development of Small-Scale Fisheries and the Need for Strong Measures to Protect Small-Scale Fisheries in International Trade Law', Doctoral Thesis, University of Cape Town 2021, 165–177.

[128]For a longer discussion on such mechanisms and their role in WTO governance, see Young, supra n. 108, 508–510; Auld supra n. 127, 165–177.

indigenous peoples affected by trade and environment agreements during both the negotiation and dispute settlement phases, the inclusion of relevant stakeholders in formal dispute settlement processes, and clear guidelines on interactions with external organizations, with regard to transparency, participation, and oversight.

5.3 Post-Dispute Settlement

The primary issue that arises post-dispute is compliance. If a Member does not withdraw the non-compliant measure within the allocated period, compensation can be negotiated to cover the intervening period between the end of the compliance period and withdrawal of the measure. As a last resort, retaliation can be used to force withdrawal of the measure. The issue of negotiated compensation would, in most cases, not be a good remedy for the violation of an agreement concerned with environmental protection, because of its potential to become a final remedy and thus not a cure for the environmental harm. However, there should be some way of enforcing a ruling in the event of non-compliance, and therefore a need for effective retaliation procedures.

Firstly, as discussed in Section 4, cross-retaliation should be provided for in the first instance, to avoid any problems that may involve the contravention of a State's own commitments to ban certain fisheries subsidies. Although there has been criticism of the court's approach to broadening cross-retaliation in *US–Cotton,* this is an issue that is under negotiation within the DSU reform negotiations. Cross-retaliation is also well-established within the dispute settlement system, unlike matters such as retrospective or collective retaliation.

Secondly, Members need to consider alternatives to 'trade effects' when determining the level of retaliation, given the difficulty of proving trade effects in cases involving fisheries subsidies. Even when trade effects are in issue, this may not be a sound basis on which to enforce an agreement that is fundamentally about environmental (and to an extent socioeconomic) protection.

One possibility is to consider the harm to the environment as a basis for the level of retaliation, although this is not always possible to ascertain with accuracy, particularly where stocks are straddling or migratory or when it is unclear how much damage a particular subsidy may have caused. Jung and Jung suggest that a better measure would be the benefits that have accrued to the non-complying party by continuing to maintain the subsidy, although they note that this logic holds only if such a measure was put in place for reasons unrelated to social concerns or political pressure.[129] It is also unclear whether this would be looked upon favourably. In response to Brazil's argument in *US–Upland Cotton* that the assessment of appropriate countermeasures should take into account 'the commercial and economic advantages that are conferred by the subsidy', the arbitrator reiterated the position that trade impacts of the subsidy are material to deciding the level of retaliation.[130]

Another option could be the costs of rehabilitating fish stocks or marine ecosystems damaged by the subsidy. This can often be far more than the initial damage. As with environmental damage, however, it may be problematic to calculate in certain circumstances. Rehabilitation could also take the form of 'social rehabilitation', given the negative socio-economic effects of fisheries subsidies, particularly in coastal developing countries. This could be the costs of community development, for example, or the creation of alternative livelihoods and/or re-training for local fishers.

A simple solution would be to refer to the amount of the prohibited subsidy, as occurred in ASCM arbitrations prior to *US–Upland Cotton*, but even if accepted, this may not be sufficient in cases where the subsidy was relatively small compared to the damage caused. This also raises problems around the use of punitive measures, if several similar complaints are brought in separate cases. Indeed, given the potentially punitive nature of remedies where a level of retaliation is involved that is not related to trade flows, it is arguable that a retaliatory amount should not be determined at all. A Member could instead be required to provide assistance to a country

[129]Jung and Jung, supra n. 36, 1016.
[130]Decision by the Arbitrator, *US–Upland Cotton (2009),* paras. 4.82–4.87.

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or undertake a rehabilitation Project directly by, for example, assisting in the creation and/or enforcement of a robust fisheries management system in the complainant Member, including training, scientific advice, and equipment for the assessment of stocks, or helping to establish aquaculture and/or mariculture systems to ensure that fish continues to be available in the area.

As suggested in the submission by Iceland, New Zealand, and Pakistan, port state measures could also be used to prevent fish caught by vessels flagged to, or owned by, the non-complying Member entering the complainant Member's market. These measures are already being utilized by certain countries to prevent IUU fishing. A notable example is the EU's carding system, through which it enforces change in a country that does not comply with regulations created to protect the EU market from IUU-caught fish. However, this would not be an effective remedy for Members with less powerful markets, particularly those that are net exporters of fish. Thus, collective retaliation procedures would be especially helpful in improving the ability of such a remedy to induce compliance.

The above analysis suggests that effective enforcement under the AFS may require a toolbox of potential remedies that can be applied as circumstances demand. This would require a departure from the narrow view of 'appropriate countermeasures' adopted in *US–Upland Cotton* but is not without precedent. In *US–FSC*, the arbitrator noted that countermeasures should be suitable and fitting for the case at hand,[131] remarks which were quoted with approval in *Canada–Aircraft*.[132] However, the jurisprudence is contradictory, necessitating action by Members to ensure that arbitrators are given flexibility under the AFS to adapt the remedy to the circumstances of the case. Apart from including a clear statement to this effect, Members may wish to include an exhaustive or non-exhaustive list of potential remedies in the AFS, which would assist in ensuring the withdrawal of a non-compliant measure, and, in certain circumstances, provide a means to reverse damage done to the marine environment and/or coastal communities. Flexibility and current WTO practice further suggest that Parties to an arbitration should retain the ability to suggest remedies that would be appropriate in the circumstances of the case.

Thirdly, the possibility of retrospective remedies will need to be considered. As in the current system, remedies under the AFS should be aimed at enforcing compliance, rather than being used as punishment. However, a remedy should be available for once-off or withdrawn fisheries subsidies that contravene the Agreement, given potential environmental and socioeconomic harm, and the need to deter their use. Rehabilitation programmes, in particular, would be apposite for circumstances where a subsidy has already been withdrawn but has caused damage.

Canada has suggested in its submission to the Rules Group that Members should consider alternative remedies to 'mitigate the harmful effects already generated by the subsidy', including retrospective remedies. However, there is no indication in the Rules Group submissions whether there is broad support for this proposal from Canada and it is likely that retrospective retaliation would be one of the more challenging reforms to implement, given previous opposition to retrospective remedies. Certainly, such a remedy would need to be strictly limited to claims under the AFS. In particular, the question of monetary compensation as an appropriate remedy should be decided by Members in the AFS, given the problems raised by *Australia–Leather*.

Finally, there is the question of whether countervailing duties should be made available as a remedy in the AFS. At present these are not included, as the dispute settlement provisions in the AFS refer only to Article 4 of the ASCM. Article 11.2 of the ASCM, which deals with countervailing duties, requires that a *causal link* be established between the subsidized imports and injury to the domestic industry. As noted, this is often challenging to do in the case of fisheries subsidies, given the difficulty of proving a direct link between certain subsidies and their effects on fish production and trade. Moreover, this goes not to the problem of remedies but proof of the claim itself. There would, therefore, need to be significant adaptations made in the AFS in order for a

[131]Decision by the Arbitrator, *US–FSC (2002)*, para. 5.12.
[132]Decision by the Arbitrator, *Canada–Aircraft (2003)*, paras. 3.13 and 3.37.

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claim to be brought at all. In addition, and as pointed out by Canada in its submission, this remedy may not be apposite in a fisheries subsidies context as it would address only the harm to the domestic industry and not the environmental effects.[133] Thus, it is suggested that countervailing duties be left out of the AFS as, indeed, appears to be the intention of Members.

6. Conclusion

Complex problems like fisheries subsidies require holistic approaches if they are to be addressed effectively. The AFS provides an opportunity for the WTO to deal with the negative externalities of trade policies in fisheries, and is thus a positive step towards greater cooperation between the fisheries and trade regimes. Yet, Members should not overlook the problems this raises for enforceability.

Previous attempts to discipline fisheries subsidies in voluntary form (e.g., the FAO's International Plan of Action for the Management of Fishing Capacity, the FAO Code of Conduct on Responsible Fisheries) have had little effect on the behaviour of States. The nature of the AFS as a binding agreement, while more difficult to negotiate, has already led to some policy changes by Members. This includes the creation of several RTAs with bans on fisheries subsidies. However, the large membership of the WTO may be a necessary pre-requisite for the conclusion of a comprehensive agreement, given that fears of unfair competition often hamper unilateral reduction of fisheries subsidies.

The AFS also paves the way for further trade and environment agreements within the WTO. Apart from offsetting the negative externalities of trade, this would allow for access to a binding and enforceable dispute settlement process for environmental agreements, which can provide greater incentive for compliance than current MEA processes. To ensure such processes are effective will require changes, however. At present, the full and effective enforcement of such agreements is not possible, running the risk that the AFS and future trade and environment agreements will be nearly as toothless as their voluntary counterparts.

Several submissions to the Rules Group have highlighted concerns around dispute settlement, and the Chair has noted the need for further discussions, so it is to be hoped that Members will consider revising the dispute settlement provisions of the AFS in future negotiations. In doing so, they should pay particular attention to alternative forms of dispute resolution and remedies for non-conformity, as these are the most pressing problems when it comes to enforceability, and will require a good deal of creativity to render effective. In particular, Members should find ways to make certain sensitive issues less adversarial to avoid drawing out the process of dispute settlement. If the WTO is to move towards greater interaction with other regimes, and effectively enforce agreements dealing with environmental and social problems, it will also have to find ways to involve relevant actors in these processes as experts, ensuring the integration of diverse viewpoints to resolve multifaceted problems.

[133]Negotiating Group on Rules, *Communication from Canada* (2019), 3.

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