

The Agreement on Fisheries Subsidies and South Africa

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Abstract

Purpose – The World Trade Organization (WTO) Agreement on Fisheries Subsidies (AFS) is only the third agreement finalised after the establishment of WTO. Negotiations on the AFS started as part of the package agreed at the WTO Ministerial Conference in Doha in 2001. Negotiations gained impetus after the adoption of the United Nations’ Sustainable Development Goals (SDGs) in 2012, and the agreement was adopted unanimously at the 12th WTO Ministerial Conference (MC12) in July 2022. Thus, it took 21 years to reach agreement on the most important issues to be included in the AFS, but negotiations are continuing on several outstanding issues. The AFS relates only to marine wild catch and does not relate to freshwater catch or to aquaculture. The AFS will only enter into force when two-thirds of all WTO Members have ratified it. Since the WTO at present has 166 Members, this means a total of 111 ratifications are required. As of 12 August 2025, there have been 107 ratifications. This means that another 4 ratifications are required. As this is the most recent WTO Agreement, and especially as it is not yet in force, very little has been written about it in the academic world, and nothing has been written about it from a (South) African perspective. This study is a first attempt at filling that void. This study will first consider the rationale for the AFS, before looking at the main features thereof. It will then consider the importance of the AFS for South Africa, before concluding. The purpose of this paper is to evaluate the compatibility of South Africa’s current framework for subsidies with the AFS.

Design/methodology/approach – The paper uses a desktop study assessing legislation, relevant literature, policy and case law.

Findings – The paper finds that South Africa’s framework for fisheries subsidies is fragmented and thus unsuited to complying with the AFS since the frameworks for sustainable fishing and countervailing measures are disconnected and administered by different functional authorities and legislation. Furthermore, the current framework for subsidies in South Africa does not provide for prohibited subsidies as envisaged under the AFS. Thirdly, this paper contend that there must be a subsidy reduction commitment that differentiates between developing and developed countries. Consequently, this paper argues that the principle of common but differentiated responsibility must be an express principle of the AFS guiding the interpretation of the obligations therein. In keeping with this ethos, this paper implores that the “due restraint” provision in Article 6 of the AFS applied when raising and exploring solutions for least developed countries must be expanded to include developing countries such as South Africa and other African countries whose waters have been pillaged by fisheries subsidies. Finally, this paper insist that the AFS must carve out an exemption for artisanal and substance fishers.

Research limitations/implications – The paper would have liked to give a regional picture, but this is not possible because these legal systems are not readily available.

Practical implications – The paper offers a blueprint for South Africa to ready itself and to comply with its obligations from a legal perspective.

Social implications – The paper advocates for the plight of small-scale fisheries and the pillaging of fish resources on the African continent without commenting on the applicable legal framework for the continent.



Originality/value – To the best of the authors' knowledge, this paper is a first attempt at explaining the legal implications of the AFS on South Africa.

Keywords WTO, Sustainable development, South Africa, Agreement on Fisheries Subsidies, ITAC, Prohibited subsidies

Paper type Research paper

Introduction

The World Trade Organization (WTO) Agreement on Fisheries Subsidies (AFS) is only the third agreement finalised after establishment of WTO [1]. Negotiations on the AFS started as part of the package agreed at the WTO Ministerial Conference in Doha in 2001. Negotiations gained impetus after the adoption of the United Nations Sustainable Development Goals (SDGs) in 2012 (Irschlinger and Tipping, 2023, p. 1), and the agreement was adopted unanimously at the 12th WTO Ministerial Conference (MC12) in July 2022 [2]. Thus, it took 21 years to reach agreement on the most important issues to be included in the AFS, but negotiations are continuing on several outstanding issues (Irschlinger, 2024). The AFS relates only to marine wild catch and does not relate to freshwater catch or to aquaculture [3].

The AFS will only enter into force when two-thirds of all WTO Members have ratified it [4]. As the WTO at present has 166 Members, this means a total of 111 ratifications are required. As of 12 August 2025, there have been 107 ratifications [5]. This means that another 4 ratifications are required. Since this is the most recent WTO Agreement, and especially as it is not yet in force, very little has been written about it in the academic world (Irschlinger and Tipping, 2023; Lennan and Switzer, 2023; Switzer *et al.*, 2022; Irschlinger, 2024; Hoekman *et al.*, 2023), and nothing has been written about it from a (South) African perspective. This article is a first attempt at filling that void. In particular, the paper assesses the compatibility of South Africa's current framework for subsidies with the AFS.

To this end, this paper commences with an outline of the rationale for the AFS. We will then review the main features of the AFS, which substantiate this rationale. This is to establish the exact nature of the obligations of the signatories to the AFS. Finally, the paper assesses South Africa's state of compliance with the AFS in light of the agreement's rationale and substantive provisions. The paper finds that South Africa's framework for fisheries subsidies is fragmented and thus unsuited to complying with the AFS, as the frameworks for sustainable fishing and countervailing measures are disconnected and administered by different functional authorities and legislation. Furthermore, the current framework for subsidies in South Africa does not provide for prohibited subsidies as envisaged under the AFS. Thirdly, we contend that there must be a subsidy reduction commitment that differentiates between developing and developed countries. Consequently, we argue that the principle of common but differentiated responsibility must be an express principle of the AFS guiding the interpretation of the obligations therein. In keeping with this ethos, we implore that the "due restraint" provision in Article 6 of the AFS applied when raising and exploring solutions for least developed countries (LDCs) must be expanded to include developing countries such as South Africa and other African countries whose waters have been pillaged by fisheries subsidies. Finally, we insist that the AFS must carve out an exemption for artisanal and subsistence fishers.

Rationale for the Agreement on Fisheries Subsidies

To understand what is required to for South Africa's framework to align with the AFS, it is important to establish the rationale for the AFS. The AFS is not economic but environmental. It is a response to the catch per fishing effort decreasing by 80% since 1950, that is, you now have to put in five times the effort to catch the same volume of fish

as in 1950 (Rousseau *et al.*, 2019, p. 12238). Fishing impacts global food security, employment opportunities, livelihoods and global trade (Rousseau *et al.*, 2019, p. 12238), with a particular impact on artisanal fishers. More than 35% of all fish stocks are overfished (versus less than 10% in 1974) [Food and Agriculture Organization of the United Nations (FAO) (2020, p. 7)]. This is also evident from the number of fishing vessels, especially those that are powered by engines, with powered vessels in Sub-Saharan Africa increasing from 3,000 in 1950 to 34,000 in 1980 and to 101,000 in 2015 [6].

The AFS specifically considers the biologically sustainable level of stocks, which translates to the maximum sustainable yield (MSY) or volume of fish that can be fished without causing a decrease in fish stocks, in determining whether subsidies may be granted [7]. Overfishing is increasingly becoming a major problem and, currently, “35% of assessed marine fish stocks are exploited beyond sustainable levels” (Irschlinger and Tipping, 2023, p. 1), up from less than 10% in the 1950s. This is exacerbated by fisheries subsidies, which were estimated to be around US\$35.4bn in 2018, with US\$22.2bn earmarked for enhancing fishing capacity (Sumaila *et al.*, 2019, p. 2). Thus, the AFS is a major development for Africa, where the fisheries sector, which provides livelihoods and food security for over 400 million people, is vulnerable to exploitation (IISD, 2024). The AFS could decrease the amount of subsidies that may be paid, estimated at 25% of the value of the landed catch [8], and especially long-distance (high seas) fishing will become less profitable. Since fish is not bound to specific areas, reducing fishing on the high seas can contribute to the rejuvenation of fish stocks, including valuable stocks such as tuna.

The SDG most closely related to the AFS is SDG 14, dealing with life below water, also referred to as the blue economy. SDG 14 has ten sub-goals [9], including “effectively regulating harvesting and ending overfishing”; effectively regulating and ending illegal, unreported and unregulated (IUU) fishing to restore fish stocks to levels that can produce MSY as determined by their biological characteristics; and sub-goal 14.6, which is the aim of the agreement:

By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to IUU fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment [S&DT] for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.

It is prudent at this juncture to assess if SDG 14.6 as the underlying rationale was then transplanted into the AFS.

The WTO claims that:

The Agreement meets the Sustainable Development Goal 14.6 mandate for the WTO to negotiate disciplines to eliminate subsidies contributing to illegal, unreported, and unregulated (IUU) fishing and overfishing, taking into account the needs of developing country member (WTO, 2022, p. 4).

While this statement is true, it obfuscates that only half of SDG 14.6 is addressed. [10] Article 5 of the Chair’s final text before MC12, which related to subsidies on overcapacity and overfishing, and which relates to the first goal under SGD 14.6, disappeared between the Chair’s final text and the AFS as adopted. This means that half of the UN SDG target 14.6 has not been implemented. Table 1 sets out the differences between SDG 14.6 and the AFS:

In at least important one respect, relating to subsidies for fishing on the high seas, the scope of the AFS is wider than that of SDG 14.6, but at the same time it does not cover subsidies related to overfishing and over-capacity, which is a crucial element of SDG 14.6. This shows that there is more work to be done. It is apparent from the foregoing that sustainable fishing is the goal of the AFS as espoused by the prohibited subsidies in Articles, 3, 4 and 5 (Reinert, 2022, p. 6). But, the AFS fails to meet the goal of ensuring sustainable

Table 1. Comparison between SDG 14.6 and the AFS

SDG 14.6	AFS
Eliminate subsidies that contribute to IUU fishing	Yes, Article 3
Prohibit fisheries subsidies that contribute to overcapacity and overfishing	No (deleted from chairman's final draft text)
No provision, although it could partially resort to the prohibition on overfishing	Article 4.1: No Member shall grant or maintain subsidies for fishing or fishing-related activities regarding an overfished stock
Appropriate and effective S&DT for developing countries and least developed countries (LDCs)	Only partially. Article 3.8 provides that no disputes may be lodged against IUU subsidies in developing countries or LDCs for two years from the date the AFS comes into force Article 4.4 provides that no disputes may be lodged against subsidies related to fishing of overfished stocks within developing countries or LDCs own exclusive economic ones for a period of two years Article 6 requires due restraint in challenging any measures by LDCs Article 7 provides for technical assistance and capacity building
No provision	Article 5.1: No subsidies may be provided to fishing or fishing-related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant regional fisheries management organisation or agreement (RFMO/A)
No provision	Article 5.2: Special care and due restraint must be taken when granting subsidies to vessels not flying that Member's flag Article 5.3 Special care and due restraint must be taken when granting subsidies to fishing or fishing-related activities regarding stocks the status of which is unknown
No provision, although it could partially resort under the prohibition on overfishing	Article 11.1: subsidies addressing the impact of natural disaster are allowed, but only related to the particular disaster, the specific geographic area affected by the disaster, the subsidies must be time-limited and it may only restore capacity to pre-disaster levels
No provision	

Source(s): Table by authors

fishing by not providing for subsidies for overfishing and overcapacity. Adding these two prohibitions on subsidies for overfishing and overcapacity would largely achieve the scope of SDG 14.6. However, there is no provision for a longer phase-out period of subsidies for developing countries and LDCs, for de minimis subsidies by such countries, or for assistance to their small-scale fishers (SSFs) or artisanal fishers, nor for fishing within their coastal waters (that is, within 12 nautical miles from their baseline). To complete the picture, it is prudent to outline the substantive obligations for prohibited subsidies under the AFS.

The framework for prohibited subsidies under the Agreement on Fisheries Subsidies

The AFS starts by setting out the scope of the agreement, which relates only to wild marine catch, that is, it does not apply to fresh (inland) water or aquaculture catch. Article 2 provides the definitions. The Agreement prohibits three main types of subsidies on IUU fishing, fishing of overfished stocks, and fishing on the high seas [11]. Making these three types of

subsidies prohibited subsidies under Article 3 of the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement) [12] could have a profound impact on the health of fish stocks.

The first major provision is in Article 3, which prevents subsidies “to a vessel or operator engaged in illegal, unreported and unregulated (IUU) fishing or fishing related activities in support of IUU fishing” (Tipping, 2018, pp. 14–16; Irschlinger and Tipping, 2023, pp. 5–10). There is no obligation on a coastal state to make an IUU finding (IISD, 2022, p. 33). Developing countries are exempted from the prohibition on IUU fishing subsidies for two years from the date of entry into force [13].

The second major provision is Article 4, which prohibits subsidies “for fishing or fishing related activities regarding an overfished stock”, and an overfished stock is defined as any stock:

Recognized as overfished by the coastal Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A in areas and for species under its competence, based on best scientific evidence available to it [14].

Subsidies may, however, be granted “if such subsidies or other measures are implemented to rebuild the stock to a biologically sustainable level.” [15]. An overfished stock is a population of fish that is too low. No fishing activity directed at such stocks may be subsidised. Developing countries are exempted from this prohibition for two years from the date of entry into force [16].

The third major provision is Article 5.1, which prohibits subsidies for fishing in the high seas, that is for “fishing or fishing related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant RFMO/A” [17]. This may be the single most game-changing provision in the agreement. At present, many countries provide significant fuel subsidies, estimated at around 22% of the total fisheries subsidies granted worldwide, mostly for fishing in the high seas (also called distant water fishing or DWF) (Sumaila *et al.*, 2019, p. 2). As will be shown later, South Africa’s fishing fuel subsidy is of particular interest here. The problem with the decreased catch-per-effort over the past several decades is that fisheries subsidies are now used to enhance the level of fishing effort (such as subsidies on fuel and vessel modernization and construction), which distorts the true costs of operating a fishing vessel. Experts argue that fishing capacity enhancing subsidies contribute to overfishing, particularly in coastal countries that have low capacity to develop, monitor and enforce fisheries management regimes [United Nations Conference for Trade and Development (UNCTAD) (2024), pp. 59–60]. This includes most of Africa. Finally, Articles 5.2 and 5.3 require special care for subsidies to vessels not under a country’s own flag and for the fishing of stocks with unknown status. It is submitted that these provisions will have little effect because they are vague and discretionary [18].

Having established the exact contours of the substantive obligation that South Africa must comply with, the discussion below will then focus on the core inquiry of the paper, which is to assess the compatibility of South Africa’s regulatory framework with the AFS. This inquiry is not academic; it is required by Article 8.3 of the AFS.

The Agreement on Fisheries Subsidies and South Africa

As stated earlier, at its heart, the AFS is premised on the principle of sustainable fishing. In South Africa, the Constitution of the Republic of South Africa, 1996 (Constitution), as the supreme law, provides for the principle of “ecologically sustainable development” [19]. The term “ecologically” remains undefined. The National Environmental Management Act 107 of 1998 (NEMA) attempts to explain this but unsatisfactorily. Section 1 of the NEMA

defines “sustainable development” as the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations. This definition, premised on integration, ignores the notion of “ecologically” as is proffered by the Constitution. That aspect remains virgin ground in South African law.

The apex court in *Fuel Retailers* drew its concept of sustainable development from international law tracing the principle back to the Brundtland Commission Report [20]. Consequently, the court in *Fuel Retailers* held that the principle at a minimum provides for the principles of “sustainability” meaning optimal use of resources, “integration” which is balancing the pillars of environmental protection, economic development and social upliftment and “equitable utilization” both for the current (intra) and future (inter) generations. It has been suggested that “ecologically sustainable development” denotes prioritising the pillar of environmental protection above economic development and social upliftment [Vinti (2018, pp. 18–19), Van Reenen (2008, p. 178), Humby (2016, p. 219)]. The nature of the obligation has been held to be “directive” and “aspirational” as well as having shades of a second generation right since it is restricted by the internal limitation of being achieved through “reasonable legislative and other measures” [21]. These reasonable legislative measures include legislation. In this tradition, the principle of sustainable development is adopted from the NEMA into the other sector specific environmental legislation including the National Environmental Management: Integrated Coastal Management Act [22] (ICMA) and the Marine Living Resources Act [23] (MLRA). Sustainability is adopted in the ICMA which incorporates the duty of care towards the coastal environment as conceived in section 28 of the NEMA [24]. These two statutes must be read together as per section 5 of the ICMA. South Africa has also adopted a policy on the small-scale fisheries sector in South Africa [25]. to address the issue of sustainable fishing. Based on the foregoing, sustainable fishing means optimal fishing. This must be underpinned by environmental assessment to establish the sustainability of the fishing [26]. This sustainable fishing as conceived in section 24(b)(iii) of the Constitution, gives effect to the superordinate right in section 24(a), which requires that fishing must not be harmful to the environment, i.e. the fish. In fact, the prohibited subsidies under the AFS have a constitutional authority based on section 24 of the Constitution, which outlaws any conduct or law that harms the environment.

In this regard, there are several challenges with the “sustainability” determination in the AFS. Firstly, conceptually, there is a problem with the trigger for a subsidy investigation, which is sustainability. Sustainable fishing is the underlying goal of these prohibitions on the subsidies under Articles 3.1, 4.1–4.3 and 5.1. Indeed, there is a view that the actual test for all these prohibitions is a measure of the unsustainability of the fishing (Becerra Sanchez, 2022, p. 165). It is the underlying goal of SDG target 14.6, which sets the goal of prohibiting certain forms of fisheries subsidies linked to overfishing and overcapacity and the elimination of subsidies to IUU fishing by 2020. Sustainability is mentioned four times in the AFS but not directly as the basis for the prohibition. However, the problem is that the AFS does not define the term “sustainable”.

Implicitly, the only attempt is made in Article 4.3, which states that, notwithstanding Article 4.1, a Member may grant or maintain subsidies referred to in Article 4.1 if such subsidies or other measures are implemented to rebuild the stock to a “biologically sustainable level”. Article 4.1 prohibits subsidies on overfished stock. A “biologically sustainable level” is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing-related activity is taking place, using reference points including the MSY, commensurate with the data available for the fishery; or by a relevant

RFMO/A in areas and for species under its competence. In other words, it is a scientific determination, but it is vague and leaves discretion to the Member [27]. This leaves it subject to abuse. In South Africa, there is a likelihood that a fishing activity would almost always be found to be “unsustainable” if it does not prioritise environmental protection, despite the obvious benefits of economic development and social upliftment. In this way, ecologically sustainable development ensures optimal fishing. Thus, “integration” as conceived in South Africa, slants towards environmental protection at the expense of economic development and social upliftment. This would seem to advance the goal of ecologically sustainable development as mooted in the Constitution.

Sustainability is not a new concept in the WTO jurisprudence. The Preamble to the WTO Agreement incorporates sustainability as a goal of international trade as part of the principle of sustainable development. This informs not only the GATT 1994, but also the other covered agreements, including the AFS. In the same vein, the Preamble of the Decision on Trade and Environment reiterates that there is no contradiction between international trade and sustainable development. However, it is unclear which model of sustainable development is chosen here but the emphasis seems to be on an integrated approach between economic activity and environmental protection. The Appellate Body in *Shrimp Turtles* held that sustainable development, which encapsulates optimal use of natural resources, “must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement [...]” [28] *US – Gasoline* recognises the sovereignty countries have in their conception of sustainable development, a notion not lost on the AFS [29]. In *China – Raw Materials*, the Appellate Body endorsed the principle of integration as part of sustainable development [30]. In *India – Solar Cells*, the Appellate Body acknowledged the variability and nuances of sustainability in different countries that permeate this discourse and this is implied in the AFS under the marker of MSY [31]. This dictum simply means that what is found to be sustainable in South Africa may not be the same as in other countries.

Yet, it is clear that the WTO Agreement views integration and sustainable or optimal utilisation as goals or principles of sustainable development. Equitable utilisation, however, does not seem to be a goal of sustainable development under the WTO framework or maybe it simply has not been recognized as yet. Based on the foregoing, sustainable fishing means fishing that is optimal for the existence of the fish resources. This of course is still unclear since it is left to each country to decide. Regardless, in South Africa, environmental protection is prioritised to ensure sustainable (optimal), integrated and equitable use of resources as is required by section 24(b)(iii) of the Constitution on the obligation to ensure ecologically sustainable development. In other words, the concept of sustainable fishing of the WTO/AFS is given effect by South Africa. In South Africa, sustainable utilisation means optimal utilisation of natural resources, but that in itself is unclear. Maybe this will be addressed by environmental assessment as stated earlier in this discussion. But the AFS problems do not end there.

Firstly, it is unclear who will make the call that such fishing is unsustainable in the manner contemplated by the AFS. Would that be the International Trade Administration Commission (ITAC), the body charged with subsidy investigations under sections 7, 16 and 26 of the International Trade Administration Act (ITA Act) 71 of 2002 or would that be the Department of Forestry, Fisheries and the Environment (DFFE) under the NEMA? Another issue is which statute must provide for the prohibition on fisheries subsidies: should it sit in environmental legislation or in trade legislation? It is submitted that unsustainable fishing can be decided on by the DFFE under the NEMA and that ITAC must make the decision on whether subsidisation takes place under the ITA Act and its Countervailing Regulations. Legislative provision would have to be made for these contingent findings.

Secondly, it needs to be established whether there is actually provision at present for these prohibited subsidies under the regulatory framework of South Africa. Article 5.1 of the AFS prohibits subsidies for fishing in the high seas. In this regard, section 40 of the MLRA provides that:

[n]o person shall undertake fishing or related activities on the high seas by means of a fishing vessel registered in the Republic unless a high seas fishing vessel licence has been issued in respect of such a fishing vessel.

However, this does not provide for the actual prohibition of subsidies for fishing in the high seas as it regulates the right to fish rather than the prohibition of subsidies in the AFS. This means that the prohibition on providing subsidies for fishing in the high seas is not complied with in South Africa. It also applies only to vessels registered in South Africa.

Article 3 of the AFS prohibits subsidies for IUU fishing. To this end, the Draft Regulations Relating to the Entry of Foreign Fishing Vessels into South African Waters (the Draft Regulations) seek to amongst others, prevent, deter and eliminate IUU fishing [32]. The Minister of Environment, Forestry and Fisheries (Fisheries Minister) may deny a vessel entry into South African waters where the vessel is on “reasonable grounds, suspected of being involved in IUU fishing, or is listed on an IUU vessel list by any country or in terms of any international agreement” [33]. However, this right will be removed since it is alleged to be in violation of Article 17 of the United Nations Convention on the Law of the Sea (UNCLOS), which grants the right of innocent passage through a country’s waters. On the contrary, Article 19.1 of the UNCLOS states that passage is:

Innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

Article 19.2(i) then states that passage of a foreign ship is regarded as “prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities” including “any fishing activities”. This would mean that vessels engaged in any type of fishing violate the right of innocent passage. Thus, this provision should actually be retained to lay the groundwork for the finding of IUU fishing under the AFS.

The Draft Regulations also seek to give effect to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (the Port State Agreement) [34]. Consequently, since South Africa has signed this agreement, these Draft Regulations contain numerous provisions to comply with it. In particular, the Draft Regulations provide for the duty to advance notice of entry into a South African port as provided in Article 8 of the Port State Agreement [35]. Regulation 7(3) of the Draft Regulations provide for a right of inspection of a vessel by an authorised person while in South African waters, which is provided for by Articles 9, 12, 13, 14 and 15 of the Port State Agreement. The Draft Regulations also preclude entry into South African waters without notifying the Fisheries Minister, a permit requirement system and the stowage of fishing gear as well criminalizing non-compliance [36]. Permits to enter port must be rejected where there are “reasonable grounds to believe the vessel has engaged in IUU fishing unless entry is required for purposes of inspection and enforcement” [37]. Proposed amendments to the Draft Regulations include the prohibition of transshipment at sea which would make it difficult to prevent illegal fishing unless it is allowed through a permit under section 13 of the MLRA [38]. While this framework is not yet in operation, it does indicate efforts to comply with Article 3 of the AFS on IUU fishing, at least by outlawing IUU fishing.

To augment this, section 18 of the MLRA has a catch-all provision that prohibits any commercial or small-scale fishing or operating a fish processing establishment unless the right to do so has been granted by the Minister for up to 15 years. This partially covers the prohibitions in Articles 3.1 and 4.1 on overfished stocks. The only issues here are that the Minister “may” request an Environmental Impact Assessment (EIA) before making this call which undermines the goal of ensuring sustainability, and that there is no express prohibition on granting Article 3.1 and 4.1 subsidies. An EIA is not optional for any development that has sustainability implications as is apparent from the NEMA [38]. It can be argued that ecologically sustainable development demands an EIA. This argument has been convincingly made in respect of climate change impact assessments which were not an explicit requirement of South African law prior to the advent of the Climate Change Act 22 of 2024 (Murcott and Vinti, 2024, pp. 1–21). The same considerations should apply here. In fact, the provision that an EIA is discretionary is likely unconstitutional in light of the mandate to ensure ecologically sustainable development. Therefore, South Africa, once it adopts the Draft Regulations, will comply with Article 3 of the AFS in respect of making findings on IUU fishing.

But, as is evident, this is only half the task. The second part of the prohibition is that there must have been a subsidy granted in this regard. It is common cause that the Countervailing Regulations already define a subsidy. In particular, section 8 of the Countervailing Regulations of 2004 (CVR) provides that:

[f]or the purpose of these regulations, a subsidy shall be deemed to exist if there is a financial contribution by a government at any level or any public body within the territory of an exporting country or there is any form of income or price support by government and a benefit is thereby conferred.

This definition complies with the definition of subsidies as contemplated in the AFS and its precursor, the ASCM [39]. However, ITAC will have to make a determination based on available information as to whether a subsidy exists. Such investigation is likely to take time [40].

South Africa itself has in place a diesel fuel rebate and refund facility for offshore vessels under the CEA, which provides for a refund of the fuel levy leviable on distillate fuel under certain conditions [41]. Such refunds are granted to anybody who purchased and used such fuel in accordance with these provisions and is registered for value-added tax purposes, and for diesel refund purposes on compliance with the requirements determined by the Commissioner for the South African Revenue Services (SARS). This subsidy was introduced in 2000 and the rationale for including fishing here was aptly captured by the National Treasury:

The fishing industry is the most intensive user of diesel fuel [...] The contribution of fuel levies to total production costs in the fishing sector ranges up to 21 %. This cannot be recovered from international markets due to fierce competition and resulted in the suspension of certain fishing activities. Most other major fishing countries do not require their domestic fishing industries to bear the cost of any fuel levy or similar tax on the consumption of fuel for their vessels. Foreign-flagged vessels, fishing South African resources, using South African ports and targeting the same markets, operate in a fuel tax free environment (National Treasury, 2017, pp. 8-9).

The CEA further provides for a rebate and refund of fuel levy [42] for qualifying activities that include farming, forestry, mining and fishing. In particular, the rebate is granted to “offshore vessels”, which include commercial fishing vessels, and amounts to approximately 25% of the total cost of fuel [43]. In this regard, “commercial fishing vessels” means vessels designed or adapted and used for commercial sea fishing as contemplated in the MLRA and

which are propelled by inboard engines of which the fuel tanks form an integral part of the structure and any dedicated mother ship in which fish is processed [44]. “Sea fishing” includes the catching of “fish” as defined in the MLRA and the processing of fish while at sea, but it excludes whaling, sealing or the catching of fish for non-commercial purposes [45]. We submit that the fuel rebate is a “subsidy” within the meaning of Article 1.1 of the ASCM and section 8.1 of the Countervailing Regulations, as it confers a benefit through a financial contribution in the form of foregoing revenue which is due and it is bestowed on a specific industry. In particular, this fuel subsidy could be prohibited under the circumstances of Articles 3.1, 4.1 and 5.1 of the AFS as the agreement prohibits subsidies on IUU fishing, overfished stocks and subsidies for high seas fishing respectively for “fishing related activities”, which include the provisioning of fuel under Article 2 of the AFS. The Special and Differential exemption provisions in Articles 3.8 and 4.4 of the AFS do nothing to allay the concerns of South African fishers receiving this much-needed subsidy, as it is limited in terms of time to just 2 years.

South Africa denies that the fuel rebate is a subsidy (Ginindza, 2024). As outlined above, we posit that it is indeed a prohibited subsidy under the AFS. After the 2-year moratorium exemption in Articles 3.8 and 4.4, subsidies such as the fuel rebate, if it is used for IUU fishing, fishing of overfished stock, or fishing on the high sea, would be regarded as prohibited subsidies under Articles 3.1, 4.1 and 5.1 of the AFS. At the same time, it goes without saying that the fuel rebate is a good example of an elitist policy that fails to cater to the interests of SSFs and communities who also would need this subsidy. In fact, the very definition of a small-scale fisher precludes such a person from owning or being part-owner of a commercial fishing right and thus shuts the door to this subsidy [46]. This approach is clearly “inequitable” (Young, 2017, p. 304). Thus, we argue that the rebate must be extended to include artisanal and subsistence fishers/communities. In fact, it has been argued that allowing the subsidisation of transport may actually ensure sustainable fishing by SSFs, as they have access to other fish stocks which are not overfished in new areas, although it was suggested that such access should be limited (Auld, 2020, pp. 135 and 148). Of course, to the contrary, it has also been argued that this fuel subsidy prohibition is sometimes overcome by countries simply maintaining a low fuel price, which negates the specificity requirement and is, in actual fact, a reflection of the general economic policy of countries (Lee, 2014, pp. 502–505). In the final analysis, South Africa could be required to repeal this fuel rebate subsidy to comply with its obligations under the AFS since it falls foul of its provisions in this regard. Alternatively, South Africa would have to be very careful not to grant such a subsidy to any operator or vessels found to be involved in IUU fishing, fishing of overfished stocks or fishing on the high seas.

However, we submit that the AFS should have exempted subsidies granted by developing countries for a period longer than 2 years and should have provided a specific exemption for artisanal fishers and small-scale fishing communities from this prohibition, at least for fishing within territorial waters, if not within the exclusive economic zone.

This assessment must be approached with caution to ensure that these green sustainability measures do not result in the circumvention of the principle of common but differentiated responsibility. In essence, this principle states that countries have a shared responsibility to protect the environment and thus requires that those who have offended an environmental standard the most must bear a greater responsibility to address this harm than those who bear a lesser responsibility (Weisslitz, 2003, p. 476). As South Africa has noted in its trade policy, these measures on fisheries subsidies must not transfer the “burden of adjustment” to developing countries [47]. We agree with South Africa that the countries that provide the largest subsidies, such as the fuel subsidies, must be mandated to make huge reduction commitments while allowing policy space for developing countries to provide support for its

artisanal and subsistence fishing activities⁴⁸. In other words, South Africa's fuel rebate, despite being a prohibited subsidy, must be exempt from the AFS as a measure or be subject to a slower reduction commitment, at least for fishing within its own exclusive economic zone. Secondly, the revised AFS must also add a subsidy reduction commitment for developing and developed countries premised on the principle of common but differentiated responsibility as is done under the Paris Agreement and Kyoto Protocol to the United Nations Framework Convention on Climate Change 1992 [48]. This means that this principle of common but differentiated responsibility must be an express principle of the AFS. Thirdly, the due restraint provision in Article 6 when raising and exploring solutions must be expanded to include developing countries such as South Africa and other African countries who have been pillaged by fisheries subsidies provided by other countries.

It is pertinent to note here that the Policy for Small Scale Fisheries Sector in South Africa of 2012 provides for subsidies for the storage of fish in the form of financial support for storage facilities and ice machines and for the establishment of locally based and owned marketing companies, especially companies focusing on high quality marine living resources caught by Small Scale fishers by use of environmentally friendly catching methods [49]. This is actually one of the shortcomings of the AFS. It only applies to marine fishing and fishing related activities, but not to anything that takes place on land, such as storage or processing. Thus, South Africa (or any other country) could provide massive subsidies for processing fish caught without subsidies, even where the fishing boats and the processing plant are owned by the same owner. Thus, there is a real risk that the AFS could simply cause a diversion of the subsidies, entrenching the might of large-scale fishers.

Finally, as all subsidies prohibited under the AFS are regarded as prohibited subsidies under the Subsidies Agreement, this means that if challenged, the subsidy must be immediately withdrawn and special procedures will apply in any WTO dispute settlement, notably shorter periods for a panel to finalise a dispute. [50] It is up to the coastal state to decide what sanctions should be applied to the operator/vessels found to be engaging in IUU fishing, but the subsidising Member has to immediately cease its subsidies to the vessel/operator.

Conclusion

The AFS is a welcome step in the right direction and could have a positive impact on the fishing industry in South Africa by prohibiting subsidies to vessels engaged in IUU fishing or fishing of overfished stocks in South African waters or fishing on the high seas. By removing these subsidies, such fishing becomes less attractive economically and may leave more fish in the sea for South African fishers, including SSFs. This could lead to a rebound of fish stocks and increased MSYs, which, in turn, could lead to larger fishing quotas, especially for artisanal fishers and SSFs. This could have a massive positive impact on the local fishing community and sustainable job creation.

At the same time, this will require vigilant monitoring by DFFE to ensure that no vessels receiving such subsidies operate within South African waters or that if they do, such subsidies are immediately challenged. This will also require close cooperation between DFFE and ITAC, who would have to determine whether there is indeed a subsidy. This convergence of interest in sustainable fishing practice requires a coalescence of divergent competencies residing in different institutions, both at local and at a global level (Hoekman *et al.*, 2023, p. 281). ITAC's legislation, most probably the CVR, would have to be amended to provide for investigating fisheries subsidies and within a significantly reduced time frame, as the current regulations provide ITAC with up to 18 months to make a determination on subsidisation. [51] Artisanal fishers and SSFs cannot wait 18 months while fish is being stripped from South African waters.

There should also be additional provisions on special and differential treatment in the AFS, including longer periods for developing countries to phase out subsidies and to provide for subsidies to artisanal fishers and SSFs.

Notes

- [1.] The other two agreements were the Information Technology Agreement, adopted in 1996 (www.wto.org/xxx), followed by the Trade Facilitation Agreement (TFA), adopted in 2013. (www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm).
- [2.] See [Lennan and Switzer \(2023\)](#), pp. 165-167 for more detail on the AFS' negotiation history.
- [3.] Art 1 of and footnote 1 to the AFS.
- [4.] www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_acceptances_e.htm
- [5.] www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_acceptances_e.htm shows a total of 76 ratifications, but this shows the EU as a single ratification. However, footnote 1 to the AFS indicates that ratification by the EU will be counted by EU Members, that is, it counts as 27 ratifications.
- [6.] [Rousseau et al. \(2019\)](#), p. 12240 (this indicates the total volume for both artisanal and industrial fleets).
- [7.] Art 4 to and footnote 11 of the AFS.
- [8.] [Sumaila et al. \(2019\)](#), p. 2) sets out the value and division of known fisheries subsidies.
- [9.] www.globalgoals.org/goals/14-life-below-water/
- [10.] See [Switzer et al. \(2022\)](#), p. 361, which indicates that WTO "membership promulgated an Agreement on Fisheries Subsidies (AFS), which met *some of the goals* of SDG 14.6" (emphasis added).
- [11.] Arts 3, 4 and 5 of the AFS. See also [Costa Rica Advances Global Marine Conservation Efforts with Acceptance of WTO Fisheries Subsidies Agreement \(2024\)](#).
- [12.] AFS footnote 18.
- [13.] AFS Art 3.8. Technically, they are subject to the prohibition, but other Members cannot challenge them if they do confer such subsidies.
- [14.] AFS Art 4.2. See in general [Tipping \(2018\)](#), pp. 16-18).
- [15.] AFS Art 4.3.
- [16.] AFS Art 4.4.
- [17.] See in general [Irschlinger and Tipping \(2023\)](#), p. 15).
- [18.] See in general [Irschlinger and Tipping \(2023\)](#), pp. 15-16).
- [19.] Section 24(b)(iii) of the Constitution.
- [20.] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) (7 June 2007) paras 46-56.
- [21.] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 (5) SA 512 (T) (28 March 2006) para. 17.
- [22.] National Environmental Management: Integrated Coastal Management Act 36 of 2014.
- [23.] Marine Living Resources Act 18 of 1998.

- [24.] See s 58 of the ICMA.
- [25.] Policy for the small scale fisheries sector in South Africa N474 GG 35455 (20 June 2012).
- [26.] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* para 16.
- [27.] FAO (2020, p. 7) to the AFS.
- [28.] Appellate Body, *US – Shrimp*, para. 153.
- [29.] Appellate Body, *US – Gasoline*, p. 30.
- [30.] Appellate Body, *US – Shrimp*, paras. 152-153.
- [31.] Appellate Body Report, *India – Solar cells*, para. 5.72.
- [32.] Regulation 3(c) of the Draft Regulations.
- [33.] Regulation 4(3) of the Draft Regulations.
- [34.] Regulation 2(d) of the Draft Regulations.
- [35.] See Regulation 4 of the Draft Regulations.
- [36.] Regulations 5, 6(1), 6(5), 7(1), 7(3), 8(1), 8(2), 9, 10 and 11 of the Draft Regulations.
- [37.] Consultation on the proposed regulations relating to the entry of foreign fishing vessels into South African waters: GN NO. 5774 in GG No. 51950 of 24 January 2025.
- [38.] Section 240 of the NEMA read with the Environmental Impact Assessment Regulations of 2014 GN R982 in GG 38282 of 4 December 2014).
- [39.] See Art 1 of the AFS and Art 1 of ASCM which link the definitions in both agreements.
- [40.] See [Brink \(2004\)](#), Annex 8 for an analysis of the duration of subsidy investigations in South Africa.
- [41.] See s 64(1A) of the CEA, read with Part 5A of Schedule No. 1 to the CEA and item 670.04 of Schedule 6 of the CEA.
- [42.] S 75 and Note 2 of Schedule 6 Part 3.
- [43.] In terms of Note 6 of Schedule 6 Part 3 of the Customs and Excise Act 91 of 1964, this amounts to 370 cents per litre fuel levy, plus 218 cents per litre Road Accident Fund levy, equalling 588 cents per litre.
- [44.] It excludes any fishing vessel contemplated in item 670.08 in Part 3 of the CEA.
- [45.] Eligible purchases require amongst others, it being applicable in respect of fishing vessels which are owned or chartered by a legal person registered in South Africa in accordance with its laws and which has its place of effective management in the Republic, or by a natural person who is ordinarily resident in the Republic; carried on with the aim of making a profit; and if used in an engine for the propulsion of, or operating of any equipment used on board, of such fishing vessels.
- [46.] Section 4(4)(b) of the GN 229 of 8 March 2016: Regulations relating to Small-Scale Fishing, 2015 (*Government Gazette* No. 39790).
- [47.] DTIC Trade Policy Statement (2021) 8.
- [48.] See Arts 3-7 of the Kyoto Protocol and Arts 3, 4, 7, 9, 10, 11 and 13 of the Paris Agreement.
- [49.] GN No. 474 in GG No 35455 of 20 June 2012 para 4.2.
- [50.] Arts 4.2 to 4.12 of the Subsidies Agreement.
- [51.] Regulation 20 of the CVR.

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