

Laudable Agreement to End Fisheries Subsidies Has Big Loopholes

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SUMMARY The overarching, laudable goal of the WTO agreement is to curb government subsidies that contribute to overfishing. But the devil is in the details. The current text leaves open the possibility for circumvention in four key ways that we identify in this brief. If these loopholes are not addressed in the next round of negotiations or later in implementation, then the effectiveness of the agreement may be at risk.

After more than a decade of meetings and work, an agreement to “end fisheries subsidies” under the auspices of the World Trade Organization (WTO) was adopted in June 2022. The agreement will enter into force once two-thirds of WTO members formally accept it. With 164 member states, that means 110 is the number needed. As of this writing, 43 have formally accepted the agreement. Members have decided to continue negotiations and discussions on outstanding issues, leading up to the WTO’s 13th Ministerial Conference in Abu Dhabi in February 2024.

The WTO agreement¹ aims to directly tackle government subsidies that contribute to illegal, unreported, and unregulated (IUU) fishing and overexploitation of fish stocks along with other goals. Nearly 90 percent² of the world’s marine fish stocks are now fully exploited, overexploited, or depleted. Agreeing to stop using taxpayer dollars to drive down global fish stocks to unsustainable levels sounds like an obvious positive step.

How to implement and enforce the agreement may be as important as the agreement itself. One of the overarching, laudable goals of the WTO agreement is encompassed in Article 3.1: “No Member shall grant or maintain any subsidy to a vessel or operator engaged in illegal, unreported and unregulated fishing or fishing related activities in support of IUU fishing.” Article 4 prohibits subsidies regarding overfished stocks, and Article 5 makes clear that the prohibition on subsidies pertains even to areas outside of the jurisdiction of coastal members (i.e., the high seas). But the devil is in the details. In this issue brief we identify several loopholes that should be addressed in the implementation phase to ensure the effectiveness of the agreement.

LOOPHOLE # 1: NO INVESTIGATIONS

One significant loophole is buried in a footnote to Article 3.2: “Nothing in this Article shall be interpreted to obligate Members to initiate IUU fishing investigations or make IUU fishing determinations.” This means that no government is obligated to actively investigate its citizens who might be fishing illegally or to make any determinations that would result in a removal of subsidies. As a result, governments will not necessarily initiate investigations into the conduct of their own fishers.

Once a determination is made, members (presumably) must follow the rules, but it will be left to each member to develop, through national legislation and policies, the relevant procedures to initiate an investigation.

It is possible that if questioned a country will not activate subsidy withdrawal for illegal fishing, pointing to this paragraph. As we discuss further, transparency will be critical to successful implementation of the agreement. Without public transparency, most people will never know there was an issue to investigate. Increased transparency in enforcement could help if governments were to publish the results of regular inspections. Public trust would be enhanced if governments were seen to be fulfilling their duties, thereby making it easier for citizens to understand whether subsidies are facilitating illegal fishing and, in turn, causing depletion of fish stocks.

LOOPHOLE # 2: WEAK PENALTIES

The second loophole is in Article 3.4, which states: “The subsidizing Members shall take into account the nature, gravity, and repetition of IUU fishing committed by a vessel or operator when setting the duration of application of the prohibition in Article 3.1.” While it is suspected that some fisheries would be uneconomical without subsidies, there is little publicly available data from governments on the extent of these subsidies. It will be up to governments to determine if a fisher is engaging in IUU fishing and to determine the extent of any penalties. But government officials are often politically beholden to these fisher constituencies, some of whom may be at risk of being put out of business by government actions. Hence, even if a vessel is suspected to have engaged in IUU fishing activity, a government may be strongly motivated to refrain from making the official designation—in which case the subsidy will likely continue.

Governments should design publicly transparent rules and procedures that rely on verifiable data for making an official IUU designation, despite these strong incentives not to do so. Penalties for illegal fishing are woefully inadequate in much of the world, given that breaking fisheries rules is often perceived to be a “victimless” crime. Attempts at stronger enforcement are often met with substantial political blowback for enforcement agencies. There are examples from around the world of both rich countries with strong legal systems and developing countries with systems less strong that have attempted reforms or have made reforms they have then had to roll back.

Industry insiders recall the saga that followed 2006 efforts by the National Oceanic and Atmospheric Administration (NOAA) to stop illegal sale and purchase of cod in Gloucester, Massachusetts. A morning

raid of a seafood auction was followed by years of lawsuits, opposition marches, and dismissal of the lead NOAA investigator, all demonstrating that opposition to fisheries enforcement might hamper implementation of the agreement.³ Even countries like Thailand that have been lauded for their efforts to build effective compliance regimes are looking at rolling back their efforts in the face of sustained industry opposition.⁴ In these situations, there will be strong incentive to not apply subsidy prohibitions.

LOOPHOLE # 3: WEAK OR OPAQUE SCIENCE AND MANAGEMENT

The agreement rightfully includes a prohibition on granting “subsidies for fishing or fishing related activities regarding an overfished stock” (Article 4.1). But *overfished* and *overfishing* refer to two distinctly different states, and the choice to only limit subsidies for overfished stocks may have been the politically easier one. *Overfished* refers to the status of current biomass compared to some point in the past that is indicative of the maximum sustainable yield (MSY). *Overfishing* is a level of fishing effort that if continued will lead to an overfished state in the future. A policy that only prohibits subsidies on “overfished” fisheries leaves room for governments to stay within the letter of the agreement yet continue to subsidize unsustainable levels of fishing.

Humanity’s well-known ability to permanently alter fish stocks means that we would be better served by a more conservative policy that also prohibits subsidies on stocks with current overfishing, and there is still the possibility that the second round of negotiations will take such action. However, this approach would encompass many species that are sought by industrial fishing efforts from many countries, and there are other significant ways in which governments can avoid following this part of the agreement, mostly related to the science and processes of fisheries management. A good example is the use of stock assessments and the calculation of MSY to determine whether a fish stock is overfished or subject to overfishing. Decision makers in fisheries management rely on stock assessments to make reasoned choices. But these stock assessments are based on statistical modelling using a variety of sampling techniques that can be manipulated in a variety of ways to provide a veneer of certainty to data that might have quite a wide window of uncertainty. All stock assessments should be made public, including the terms and baselines used in making the assessment, and the baselines should be chosen in a transparent and consistent manner.

Unless stakeholders agree on transparency measures, governments will find it relatively easy to avoid the need to remove subsidies—for instance, by simply not providing an accurate assessment of a species. There is no enforcement mechanism to ensure that governments with fishery resources manage those resources in a sustainable way by making transparent and publicly reasonably updated stock assessments, data, and processes, despite the requirements of the United Nations Convention on the Law of the Sea (UNCLOS). There are a few examples of organizations that offer public transparency into fishery resources within national waters, two of the best being NOAA in the United States and the International Council for the Exploration of the Sea (ICES) for countries in the North Atlantic (mostly European).⁵

Many countries do not even publish lists of vessels with valid licenses, let alone the kind of transparent stock assessments that would be needed to credibly identify “overfished” species under the treaty. This is reflected in the assessment promulgated every two years by the United Nations (UN) Food and Agriculture Organization’s (FAO) Status of Fisheries and Aquaculture, which only discusses aggregated stocks at the regional level and does not provide stock lists and status for individual countries.⁶ National level assessments like this would highlight deficiencies in fisheries science and management in many countries. These kinds of deficiencies may be the result of political pressure from fishing interests or the high costs of fishery survey vessels but may also result from maritime border disputes, such as those taking place in the South China Sea, that encourage unsustainable fishing activity as a way to establish a claim to historic use of maritime territories.

LOOPHOLE 4: LACK OF TRANSPARENCY

Critically, Article 8.1 of the agreement requires that all the fisheries science, data, processes, and determinations mentioned above be reported, including whether any fish stocks are shared with other countries. These reports, if made public, would create an opportunity and path for transparency and accountability. However, these goals require that all submissions be public and complete. This kind of technical information flowing from countries to international bodies is frequently buried as confidential, or is withheld, or is simply not submitted. This noncompliance slows the entire process to the point where it may go unnoticed. The public may remain unaware and governments may fail to push for additional information—governments may lack capacity, or they may not see it as their purpose to question others, or they may have other foreign policy goals that discourage conflict or confrontation with other countries.

Free and open societies with properly functioning markets need both accessible and useful information to ensure effective governance and accountability. With these factors in place, civil society can mobilize and respond if their national governments continue to subsidize overfished fisheries or submit inaccurate fishery management assessments, claiming stocks are healthier than they are, in order to avoid subsidy withdrawal. At the very least, business and other stakeholders should be able to use public data on subsidies to decide if the products meet their sustainability criteria, something that is almost completely absent from the public domain unless there is a private certification involved.

An excellent example of such a process was the response of retailers and supply chain companies to calls for reduced catches of tuna in the Indian Ocean.⁷ Yellowfin tuna in the Indian Ocean has been subject to overfishing for several years, by some accounts since 2016. The fishery is managed through an international body, the Indian Ocean Tuna Commission (IOTC), that enables transparency on the stock health and fishery management process, including the quota system. This year the IOTC presented data to EU authorities showing illegal netting of tuna in that area by European-flagged or -owned purse seiners (a purse seine is a large wall of netting deployed around an entire area or school of fish).⁸ While the fishery is not yet on a path to being rebuilt, it is the subject of a significant advocacy campaign that includes both the private sector and charities. This campaign is enabled by the transparency of the process and the accessibility of the fishery’s science data and serves as a template for how the transparency provisions in the WTO agreement might work.

Given the absence of meaningful enforcement mechanisms within the agreement, public transparency and democratic pressure through civil society will be critical to meeting the agreement's sustainability objectives. Local fishing communities and their leaders need to be part of the implementation; otherwise, they may undermine efforts toward it. All WTO members need the local governments to be stakeholders in the implementation of the WTO agreement. Otherwise, they should count on receiving harsh blowback from local fishers and their communities, which can prove nearly impossible to overcome.

CONCLUSION

It is not our intent to say that the WTO Agreement on Fisheries Subsidies cannot be effective, but the probability of success for this agreement depends on effective implementation and enforcement. It is one of the last major international agreements related to fisheries in the pipeline of treaties and agreements that followed the UN Convention of the Law of the Sea in the 1980s, along with the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction (often called the "high seas" treaty) in 2023. These agreements have sought to improve ocean governance and have espoused goals related to the sustainability of fishery resources, yet the resilience and sustainability of fisheries has continued to deteriorate.

The WTO process can be slow and complex, which does not align well with industrial fishing technology that is capable of diminishing fish stocks on a rapid scale. Few today remember the pollock fishery of the Central Bering Sea, which would be one of the largest fisheries in the world if it still existed. Overfishing led to the collapse of the pollock fishery with "a lack of knowledge about populations biocomplexity added to the confusion of how best to manage the harvest."⁹ Although a "moratorium" on fishing in that area was declared in the 1990s, the fishery collapsed completely and has never recovered.

Transparency and accountability, however, can counter these forces. In the absence of a means to compel compliance, it is critical for interested parties, wherever they are in the world, to have unfettered access to information on the operation of this agreement, no matter how limited that information may be. Implementation must also be designed to require a realistic level of government enforcement, as resources will ebb and flow.¹⁰

People need to be able to connect the dots. Transparency and accountability will enable individuals, civil society, and businesses to exercise the tools at their disposal to make informed decisions about how they pressure governments or make purchases, or provide feedback to businesses that purchase seafood from subsidized fishing.

The probability of the agreement's success depends on effective implementation and enforcement. In the short term after ratification, the relevant government agencies and nongovernment organizations should collaborate on designing ways to ensure robust reporting by all members in all countries across all aspects of the agreement, and easy access to that reporting in the public domain. It may be the best we can do to build the case for further agreements. Hopefully, many of our shared natural resources will last long enough for those agreements to come.

ABOUT THE AUTHORS

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ABOUT THE SERIES

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NOTES

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