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**THE AGREEMENT ON FISHERIES SUBSIDIES AS THE
WTO EFFORT TO IMPLEMENT SUSTAINABLE FIS-
HERIES**

Abstract. From a practical point of view, the implementation and operationalization of the fisheries principles at the global level is possible only through the interaction of a number of actors. For instance, the role of the UN is to conceptualize these principles, to give them a certain legal frame and content. The next step is implementation itself, and this role was traditionally delegated to the regional fisheries management organizations, since they have every opportunity to provide concrete measures which make certain principle executable. Nevertheless, sometimes the implementation process requires fundamental economic measures, which cannot be taken at the regional level. This particularly applies to the area of struggle against poor fisheries practices, such as IUU fishing, overcapacity and overfishing. This article examines the Agreement on Fisheries Subsidies, which was adopted at the WTO level in 2022, its applicability and relevance in the context of sustainable fisheries principles implementation.

Key words: fisheries, international law, environmental law, the World Trade Organization, harmful subsidies.

JEL classification: K32, K33

Introduction

The international community is faced with the necessity to ensure the operationalization of international fisheries principles, i.e. the adoption of such legislation that could ensure the practical implementation of these principles. Some researchers propose to give ecological integrity and sustainability the status of Grundnorm, that is, such a norm that underlies the entire system of international law (Kim 2015). Others point to the insufficiency of existing efforts to operationalize the principles of international fisheries, characterizing the measures being taken as a

‘façade’ that is not able to ensure their real application (Böckenförde 2003).

It appears that the most effective way to ensure the implementation of international fisheries principles and the overall sustainable development of this area at the global level is to limit the volume of fishing carried out. FAO estimates that the proportion of fish stocks fished at sustainable levels dropped to 64.6 percent in 2019, down from 90 percent in 1974. At the same time, since the late 1970s, the proportion of stocks fished beyond the level of biological sustainability has been growing. So, if in 1974 it was 10 percent, then in 2019 it is already 35.4 percent (FAO Report 2022). At the same time, FAO draws attention to the fact that the main threat to a number of species and the fishing industry in general is IUU fishing, overfishing and overcapacity, i.e. unscrupulous and illegal fishing practices.

These factors and their disastrous effect have brought the international community to the necessity of taking measures against such manifestations of poor practices in fisheries management. Thus, the WTO, despite the fact that ecological matters are not the part of common jurisdiction and field of this organization, has taken measures in order to prevent and nullify these unfavorable practices.

1. The ‘harmful subsidies’ and its impact on sustainability of marine resources

The need to combat disastrous fishing practices was already reflected in the Johannesburg Plan of Implementation of the World Summit. Paragraph 31f) of the Johannesburg Plan indicates the need for action to eliminate subsidies that encourage illegal, unreported and unregulated fishing and the creation of excessive fishing capacity (Johannesburg Plan 2002, p. 18). A similar provision, but now as a specific target, is enshrined in the Agenda 2030. Thus, goal 14.6 is to prohibit certain forms of fishing subsidies that promote overfishing and the creation of overcapacity and to eliminate subsidies that encourage IUU fishing by

2020, as well as to refrain from introducing new subsidies of this kind (Agenda 2030 2015, p. 24).

Not surprisingly, so-called ‘harmful’ subsidies, which are subsidies that encourage overfishing, IUU fishing and overcapacity, have become the subject of regulation. According to Oceana, an international non-governmental organization for the protection of the oceans, the total amount of harmful subsidies provided by governments in 2018 was \$22.2 billion, with the top ten responsible for providing 69% of this amount (\$15.4 billion). In addition, the study of the organization shows that 63% of subsidies provided annually by governments are harmful (from the amount of \$35 billion). Considered a bloc, the EU provides \$2.0 billion in harmful subsidies, which would make it the third largest supplier (Oceana 2021).

The Johannesburg Plan and Agenda 2030 highlighted the activities of the WTO aimed at developing legal regulation in the field of harmful subsidies. Negotiations on this issue in the WTO have been conducted since the ministerial conference in Doha, i.e. since 2001, and in 2015 the negotiation process was especially intensified (Lennan, Switzer 2023). During the discussions of the 2030 Agenda by groups of WTO states, proposals were put forward regarding the achievement of the task specified in paragraph 14.6.

2. Negotiations on harmful fisheries subsidies ban within the WTO

The EU proposal offered the most drastic action to ban harmful fishing subsidies. Thus, the Union advocated a ban on all forms of harmful subsidies, i.e. contributing to overfishing, overcapacity and IUU fishing. At the same time, as in other proposals, it was a question of banning only specific (within the meaning of the SCM Agreement) subsidies, however, the EU proposed to withdraw subsidies for aquaculture and fuel subsidies from the agreement (EU Proposal 2016). It appears that the exclusion of fuel subsidies from the banned list was dictated by the EU's desire to develop its remote fishing fleet.

The joint proposal by Iceland, New Zealand and Pakistan also called for a ban on subsidies that encourage overfishing and IUU fishing but would maintain subsidies that encourage overcapacity. In addition, a new category of subsidies subject to prohibition was introduced, namely subsidies provided to fishing activities on the high seas and in the waters of another state (Iceland et al. Proposal 2017, p. 3). However, no exemptions were proposed for fuel subsidies. Thus, the states have raised another significant problem that is present in international fisheries, namely the problem of subsidizing remote fleets. Studies confirm that such foreign subsidies have a negative impact on the least developed countries: the risks associated with overfishing in their waters fall on the least developed countries themselves, while the profits go to developed countries engaged in remote fishing (Oceana 2021).

The proposals discussed above included a special treatment for developing and least developed countries, but this approach was most extensively reflected in the proposal of the South American States. Thus, it provided for the prohibition of all three groups of harmful subsidies, but at the same time, the main exception was the application of this prohibition to small-scale artisanal fishers (South America Proposal 2017, p. 3). Such an exemption seems rational, since industrial fishing is not widespread in developing and least developed countries, while traditional fishing practices, on the contrary, are quite widely used. Since the ultimate goal of the agreement is to achieve sustainable fisheries, a ban on subsidies for small-scale fishermen does not seem justified due to their weak impact on the sustainability of the population and the ecosystem of the ocean as a whole.

A similar position was shared by the group of least developed countries. Their proposal directly points to the need to primarily impact large-scale industrial fisheries. It also provides for exemptions for artisanal, traditional, or small-scale fisheries, as well as for fishing activities, which exclusively exploit quotas or any other rights established by a RFMO or a regional fisheries management arrangement (LDC Proposal 2016). This exemption raises questions about the very nature of sustainable use and overfishing of living resources, as government quotas

and RFMOs often fail to ensure population sustainability. At the same time, for the least developed countries, the issue of ensuring food security is much more acute than the issue of ensuring the sustainability of marine resources. Thus, an exemption could allow least developed countries to subsidize their fisheries under one condition, specifically that they fish within the RFMO quota.

Summing up, it should be noted that in the final analysis the views of the states on the main points of the draft agreement converged. Thus, the participants in the negotiation process as a whole reached a consensus on the necessity to ban harmful subsidies. At the same time, approaches to solving some operational issues of such a ban varied. Developed nations wishing to develop their offshore fleets at the same time (such as the EU countries) have advocated maintaining a number of subsidies to enable them to do so, namely fuel subsidies and subsidies for remote fishing. Developed coastal states, for which the development of remote fisheries is not so acute, are in favor of stricter regulation of subsidies for fisheries in the high seas and in the waters of other states, but at the same time they wish to preserve the possibility of modernizing their fleets by providing subsidies that contribute to the creation of excessive production capacities (Iceland, New Zealand). Developing and least developed countries are paying particular attention to the need to secure traditional artisanal fishing methods, as their fishing sectors are predominantly small-scale, non-industrial fisheries (Schuhbauer et al. 2020). At the same time, all states agree that developing and least developed countries should be given certain preferences and exemptions in order not to harm their food security.

As a result of hard work, in 2021, a draft agreement on fisheries subsidies was prepared within the framework of the WTO. The draft proposed a ban on subsidies that contribute to IUU fishing, overfishing and overcapacity, all three types of harmful subsidies. At the same time, subsidies that contribute to overcapacity or overfishing meant an extensive list of support measures, including fuel subsidies and subsidies for fishing outside the waters of the state (i.e. subsidies for remote fishing) (AFS Draft, 2021, p. 4). This provision, contained in Article 5 of

the draft, did not suit both the EU, which wants to develop its remote fleet, and developing countries, which are generally negative about the idea of a ban on subsidizing the creation of production capacities. India was especially active in expressing its dissatisfaction, since its fishing fleet is mainly represented by small fishermen, and the share of subsidies allocated for their needs is relatively small - \$ 277 million a year against China's \$ 7 billion or the EU's \$ 4 billion (Mishra 2021). In connection with the above, the draft agreement was not adopted, and the WTO began work on changing it.

Ultimately, on June 17, 2022, the 12th WTO Ministerial Meeting adopted the Agreement on Fisheries Subsidies. The agreement provides for a ban on the provision of subsidies that contribute to IUU fishing or overfishing. At the same time, a transitional regime is provided for developing and least developed countries: by virtue of Article 6, within two years from the date of entry into force of the Agreement, they are exempted from the obligation to impose bans on these types of subsidies (AFS 2022, p. 6).

Compared to the previous draft agreement, adopted on November 24, 2021, the new Agreement has been softened. Thus, the text removed the mention of any prohibitions on subsidies that contribute to the creation of excessive capacity. In addition, earlier provisions of Article 5 included an indicative list of subsidies subject to prohibition in connection with the creation of excessive capacity or overfishing, among which were fuel subsidies. This list is not included in the text of the Agreement. From this we can conclude that the WTO has adopted the position of developing countries and especially India, which advocated the preservation of subsidies that allow the modernization of the fishing fleet. In turn, it was proposed to ban fuel subsidies due to their prevalence - they make up about 22% of the total volume of fishing subsidies. (Sumalia et al. 2019). However, as noted above, the EU took the opposite position on this issue, which considered such a ban an obstacle to the operation of its remote fleet. As an alternative, the European Commission proposed the introduction of specific subsidies for the purchase of fuel (Dombrovskis 2021). However, the issue of remote fishing regulation was resolved in a

different, more radical way: Article 5.1 of the Agreement expressly prohibits the provision of subsidies for fishing carried out outside the jurisdiction of the coastal state (AFS 2022, p. 5).

Thus, the WTO decided to follow the ‘golden mean’ in the issue of regulating harmful fisheries subsidies. On the one hand, the positions of developed countries were taken into account, which advocated the preservation of non-specific subsidies for the development of a remote fleet. On the other hand, developing and least developed countries have been allowed to subsidize the industry even if it results in excessive production capacity, and have been granted a transitional period with respect to prohibited subsidies. Such a measure allows such states to make a ‘soft’ transition to the implementation of the Agreement by adapting their fishing practices over the allotted period. In addition, in accordance with Article 7, a voluntary financial mechanism is established to ensure the implementation of the rules of the Agreement by the least developed countries (AFS 2022, p. 6). Japan and Australia have already taken advantage of the mechanism with donations of 90 million yen and AU\$ 2 million, respectively.

The main problem on the way to the implementation of the rules specified in the Agreement is the complicated procedure for adopting the act. It needs to be ratified by two-thirds of its member countries, and so far the ratification process is going promising: a lot of top-providers of harmful subsidies, including China, Japan, the EU and the USA has already accepted the Agreement (List of Acceptances 2023). This gives hope that the Agreement will soon enter into force and its provisions will be applied in practice.

Conclusion

The efforts of the WTO to operationalize the principles of fisheries can be assessed as extremely effective. First, the decision-making mechanism in the organization involves reaching a consensus on the issue under consideration. It follows from this that the agreements developed within the framework of the WTO satisfy each participant in the negotiation

process, and in the future such an agreement will be implemented by all member states. Secondly, economic and trade measures make it possible to influence the sustainability of the population of marine living resources directly, and not indirectly, as traditional norms of environmental law. Thirdly, the WTO has extensive tools to influence member states that evade ratification and implementation of agreements. Thus, despite the fact that the WTO is not an environmental organization, it plays a very significant role in the process of implementing the principles of international fisheries.

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