

WTO's Role in Illegal, Unreported, and Unregulated Fishing Determinations: Standard of Review Under the Agreement on Fisheries Subsidies

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Abstract

This paper explores regime interaction and partnership within the newly established Agreement on Fisheries Subsidies (AFS) of the World Trade Organization (WTO). It examines the procedural implications of regime interaction and partnership in the dispute settlement mechanism, particularly when identifying prohibited fisheries subsidies. The paper underscores the critical role of determinations made by fisheries management regimes in the context of the AFS, effectively fostering a unique partnership between the WTO and fisheries management regimes in pursuit of ocean sustainability.

The paper first examines how the WTO relies on the determinations of fisheries management regimes in adjudicating on prohibited subsidies related to illegal, unreported, and unregulated fishing (IUU fishing), subsidies regarding overfished stocks, and subsidies to fisheries outside of the jurisdiction of a coastal member or non-member and outside the competence of a relevant RFMO/A, but with a focus on IUU fishing. Following this, it explores the optimal degree of this regime interaction based on the realization of AFS' sustainability goals and the concerns caused by the adoption of regime interaction. It argues for a partnership relationship between WTO and fisheries management regimes by adopting a deferential standard of review by the WTO panel in recognition of the expertise of fisheries management regimes. However, it also raises concerns about due process, suggesting that total deference may not adequately address these issues. The paper further argues that the current role of the WTO in IUU fishing determinations can be problematic in certain situations. The paper therefore calls for a more engaging role of the WTO in the IUU fishing determinations.

The paper concludes with the observation that this new form of regime interaction in the AFS could have significant implications for the future of multilateral trading systems, particularly in furthering environmental objectives. It posits that the regime partnership demonstrated in the AFS could serve as a model for future WTO agreements, taking into account the caveat discussed above.

1. Introduction

The Agreement on Fisheries Subsidies (AFS), the latest accomplishment of the World Trade Organization (WTO) at its 12th Ministerial Conference, offers a fresh perspective on global trade norms. The primary objective of the WTO's fisheries negotiations is to establish disciplines that prohibit certain types of fisheries subsidies contributing to overcapacity, overfishing and illegal, unreported and unregulated (IUU) fishing. Accordingly, the AFS's central focus is on environmental stewardship and ocean sustainability, rather than solely trade issues. This shift

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towards environmental concerns has influenced the structure of AFS's legal provisions, in particular the process of determining prohibited fisheries subsidies. Such a process can involve various entities, such as the coastal Member, the flag State Member, or the relevant Regional Fisheries Management Organization or Arrangement (RFMO/A), which leads to regime interactions in the AFS's dispute resolution procedures. WTO panels will need to consider determinations made by fisheries management regimes outside the WTO.

Yet, the AFS is not solely an environmental treaty. The established disciplines regarding subsidies and the WTO's expertise are vital for regulating fisheries subsidies effectively. A mere import of decisions from fisheries management regimes into the WTO discipline will not suffice to accomplish the treaty's goals. Instead, an optimal level of collaboration between different regimes is required. This paper explores such regime interaction expected in the AFS's dispute resolution procedures and discusses the ideal relationship between the WTO and fisheries management regimes in the context of pursuing ocean sustainability.

To achieve these environmental objectives, the AFS tackles issues both within and outside the WTO's core competencies. The AFS targets one of the WTO's core competencies, subsidy disciplines, to attain its environmental objectives. Recognizing the negative impact of fisheries subsidies on ocean sustainability, the Members of the WTO agree that it is suitable for the WTO to develop a multilateral solution within the AFS.

However, achieving its environmental goals also compels the AFS to address issues outside of WTO's core competency. To attain ocean sustainability, it becomes necessary for regimes to collaborate. Effective discipline on fisheries subsidies necessitates expertise both in fisheries management and subsidy disciplines. Thus, regime interaction becomes essential.

The paper posits that the regime interaction observed in this context is moving towards a closer collaboration between the WTO and fisheries management regimes, forming what this paper terms a "regime partnership." If realized, this would signify a critical development in regime interaction for the pursuit of environmental objectives within the WTO's collaboration with other regimes.

The AFS's disciplines on prohibited subsidies represent the beginning of the adoption of regime partnership that could be reflected in its dispute settlement procedure. The determination of prohibited subsidies involves two main parts, each requiring an assessment made by the involved regime—one trade, the other fisheries management. A proper standard of review is the key to achieving regime partnership in disciplining fisheries subsidies. The standard of review in the context of AFS is similar to that in other areas, such as trade remedy or risk assessment under SPS Agreement, but is different in one key respect. First, the decision-makers, i.e., the fisheries management regimes, are not obligated to comply with WTO laws. Second, AFS's need to achieve sustainability objectives. Third, the unique partnership considerations exist in the AFS context.

These lead to a strong need for a deference standard of review. This paper argues that, in an ideal world, under the current AFS, due process and legitimacy should justify panels to intervene.

Otherwise, panels should not question the weighing and balancing of the facts as well as the substance of the affirmative determinations made by fisheries management regimes. However, this vision could risk proving to be naïve in the geopolitical reality. The paper calls for a more engaging role of the WTO in the disputes under AFS.

In conclusion, the AFS represents a significant step forward in the integration of environmental sustainability objectives within the framework of international trade. By fostering a regime partnership between the WTO and fisheries management regimes, the AFS seeks to effectively discipline harmful fisheries subsidies. However, the success of this partnership hinges on the adoption of a deferential standard of review in the dispute settlement procedure. This standard of review should respect the autonomy and expertise of fisheries management regimes while ensuring due process and legitimacy. By doing so, the AFS can serve as a model for future efforts to green international trade.

Following the introduction, this paper discusses the regime interaction in AFS by examining the WTO's reliance on the determinations of fisheries management regimes in adjudicating on prohibited subsidies related to illegal, unreported, and unregulated fishing, subsidies regarding overfished stocks, and subsidies to fisheries outside of the jurisdiction of a coastal member or non-member and outside the competence of a relevant RFMO/A. Following this, it explores the optimal degree of this regime interaction based on the realization of AFS' sustainability goals and the concerns caused by the adoption of regime interaction. The paper proposes a partnership model between WTO and fisheries management regimes. This partnership model calls for a deferential standard of review by the WTO panel, acknowledging the expertise of fisheries management regimes. Simultaneously, it raises due process concerns, warning against total deference that may fail to address these issues appropriately.

In its conclusion, the paper observes that this new form of regime interaction within the AFS might have significant implications for the future of multilateral trading systems, particularly in advancing environmental objectives. It suggests that the regime partnership embodied in the AFS could potentially serve as a blueprint for future WTO agreements, taking into account the caveat discussed above.

2. Environmental Objectives: Regime Interaction and Regime Partnership in the AFS

2.1. Environmental Objectives of the AFS and their Implications for the Directions of Regime Interaction in the WTO

The recently concluded AFS aims to establish disciplines prohibiting certain forms of fisheries subsidies contributing to overcapacity, overfishing, and IUU fishing. These disciplines are not concerned with market access or trade benefits.¹ Instead, their objectives are rooted in

¹ Chang-fa Lo & Tang-Kai Wang, *From Addressing Trade Distortion to Correcting Environmental Distortion: The Fisheries Subsidies Negotiation as the Turning Point of the WTO's Task*, 16 *ASIAN J. WTO & INT'L HEALTH L & POL'Y* 153 (2021).

sustainability, specifically in preserving fisheries resources in the ocean. Therefore, the AFS underscores environmental concerns over trade ones.

Under AFS, environmental concerns do not simply function as exceptions or justifications for trade measures in violation of WTO rules. While it is not the first or the only instance in the WTO where environmental concerns go beyond the function of exceptions,² it is the first time for a WTO agreement whose primary objective is environmental sustainability. Two related trends are worth highlighting. First, the consensus on environmental objectives is encouraging. The urgency of environmental objectives as common goals among members is evident in the consensus reached in the AFS negotiations. The AFS is the first multilateral agreement under the WTO with sustainability at its core. It is also one of the two multilateral agreements the members have agreed to since the establishment of the WTO. These two firsts are not coincidental. It is no happenstance that the first major achievement of negotiations after such a long impasse is an agreement in pursuit of environmental objectives. The agreement's environmental objectives reflect that while the consensus on traditional trade objectives has been hard to reach, achieving new types of trade agreements with environmental goals may be more attainable. These new types of trade agreements could provide strong support for the development of the multilateral trading system.

Second, the AFS emphasizes that suitable trade agreements with environmental objectives should align with the WTO's core competencies. This implies that an environmentally oriented agreement suitable for the WTO should partially fall within the WTO's purview. Some might argue that environmental objectives are outside of the WTO's capacity and are better left to other international organizations in charge of environmental issues. However, the consensus reached in the AFS challenges this argument, indicating members' agreement that if an agreement addresses issues within the WTO's core capacity, it is within the WTO's jurisdiction. While the WTO cannot resolve all fisheries-related problems, it is well-equipped to handle ocean sustainability issues related to a tool central to trade disciplines: subsidies. Given its experience with subsidies, the WTO is well-placed to regulate fisheries subsidies more effectively than other international organizations, irrespective of the subsidies' objectives. The long history under the GATT and WTO that deal with subsidies is not limited to specific objectives of the subsidies. In other words, it does not matter that the subsidies at issue are fisheries ones. Accordingly, part of the fisheries subsidies falls within the WTO's core competencies.

However, harnessing the WTO's core competencies in trade agreements with environmental objectives will inevitably involve areas beyond the WTO's core competencies. The manner in which the WTO should navigate these areas is a crucial issue for the design and implementation of these new types of agreements. A response to that is regime interaction. To advance sustainability objectives, such disciplines need to foster a deeper set of regime interactions. This approach has been adopted in the AFS, which, as this paper argues, exemplifies collaboration between WTO panels and fisheries management regimes in the dispute settlement procedure. Both are needed for determining prohibited fisheries subsidies in many situations under the AFS.

² The author would like to thank Professor Peter Van den Bossche for pointing this out regarding an earlier version of this paper when presenting in SIEL 2023.

This paper labels this collaboration as a "regime partnership," representing a new type of regime interaction between the WTO and other regimes.

The trends highlighted above indicate the future of the multilateral trading system. After the deadlock of the negotiations in the WTO for a long time, the new breakthrough of AFS indicates the direction of new openings. The following sections will discuss how the sustainability objectives of the AFS foster regime interaction and regime partnership in its dispute settlement procedure.

2.2. Sustainability Objectives and Regime Interaction in Dispute Settlement in the AFS

2.2.1. Sustainability objectives and regime interaction in the AFS

The AFS was negotiated under the mandate given to WTO members at MC11 in 2017 in Buenos Aires. This mandates emphasizes that "the next Ministerial Conference should adopt an agreement on comprehensive and effective disciplines that prohibits certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminates subsidies that contribute to IUU-fishing recognizing that appropriate and effective special and differential treatment for developing country Members and least developed country Members should be an integral part of these negotiations."³ Here, the mandates of the WTO members are to prohibit subsidies that contribute to overcapacity, overfishing, and IUU-fishing. Such goals are not of the nature of trade benefits. Subsidies that distort trade and market can be and are still regulated under ASCM. Instead, the goal of the new disciplines is of the nature of sustainability. The objectives of AFS are primarily environmental.

To achieve these environmental objectives, the AFS tackles issues both within and outside the WTO's core competencies. The AFS targets one of the WTO's core competencies, subsidy disciplines, to attain its environmental objectives. Recognizing the negative impact of fisheries subsidies on ocean sustainability, the WTO is justified in developing a multilateral solution within the AFS. Consequently, the AFS regulates fisheries subsidies based on definitions derived from the Agreement on Subsidies and Countervailing Measures (ASCM), together with the concept of prohibited subsidies. These fall within the WTO's core competencies.

However, achieving its environmental goals also compels the AFS to address issues outside of WTO's core competency. To attain ocean sustainability, it becomes necessary for regimes with diverse expertise to collaborate. Effective discipline on fisheries subsidies necessitates expertise both in fisheries management and subsidy disciplines. Thus, regime interaction becomes essential. The extent to which regime interaction is adopted in this area is critical. It would be beneficial to develop a more welcoming and more open attitude towards other international organizations or stakeholders in areas outside of WTO's core competency. The development of cooperation or partnerships could lead to more effective discipline for fisheries subsidies.

³ Ministerial Decision of 17 June 2022, WT/MIN(22)/33; WT/L/1144.

Regime interaction is not a novelty in the WTO. As the AFS is the first agreement centered on environmental objectives, regime interaction becomes more prominent. In the AFS, the Food and Agriculture Organization of the United Nations (FAO) plays a role in terms of regime interaction between WTO and FAO. Under AFS Article 7, a voluntary WTO funding mechanism is to be established in cooperation with relevant international organizations such as the FAO and International Fund for Agricultural Development in support of technical assistance and capacity building to developing country members and LDC members. The frequency of the notification duty of developing members under AFS Article 8 is partly based on their annual share of the global volume of marine capture production based on the most recent published FAO data as circulated by the WTO Secretariat. Moreover, the AFS mandates the future Committee on Fisheries Subsidies to maintain close contact with the FAO.⁴

Similarly, Regional Fisheries Management Organizations or Arrangements (RFMO/As) are acknowledged as "other relevant international organizations in the field of fisheries management" under FAS Article 9.5. Therefore, the future Committee on Fisheries Subsidies is likewise mandated to maintain close contact with the relevant RFMO/As, the extent to which such relationship will be an important development for the regime interaction in the WTO's pursuit of ocean sustainability. In addition, RFMO/As are relevant in the WTO members' notification responsibilities. Under AFS Article 8, WTO Members shall provide the information regarding whether the fish stocks in the fishery for which the subsidy is provided are managed by an RFMO/A.⁵ Furthermore, regarding notifications, Members shall notify the Committee on Fisheries Subsidies any RFMO/As to which they are parties, and the Secretariat to the Committee will maintain a list of such RFMO/As.⁶ It should be noted that the role of RFMO/As in AFS does not affect the rights and obligations of the WTO members, as provided under FSA, Article 11.4, that "except as otherwise provided, nothing in this Agreement shall imply that a Member is bound by measures or decisions of, or recognizes, any RFMO/As of which it is not a party or a cooperating non-party." This provision provides further clarification regarding the relationship between the WTO and the fisheries management regimes.

The institutional linkage explicitly provided by the AFS between the WTO and FAO as well as RFMO/As is not deep. However, regime interaction in the AFS extends beyond official interaction between the WTO and other international organizations. It is also evident in the AFS's dispute settlement procedures, which this paper will explore. This paper posits that the regime interaction observed in this context is moving towards a closer collaboration between the WTO and fisheries management regimes, forming what this paper terms as a "regime partnership." If realized, this would signify a critical development in regime interaction for the pursuit of environmental objectives within the WTO's collaboration with other regimes.

2.2.2. Regime partnership in dispute settlement under the AFS

⁴ AFS, Article 9.5.

⁵ AFS, Article 8.1(b)(i).

⁶ AFS, Article 8.6.

The AFS's disciplines on prohibited subsidies represent the beginning of the adoption of regime partnership that could be reflected in its dispute settlement procedure. Certainly, if a dispute over prohibited fisheries subsidies arises, the Dispute Settlement Understanding (DSU) applies.⁷ Technically, this is a process conducted entirely within the WTO, with no explicit provision for the involvement of outside regimes, such as the peer review by the FAO under the a previous version of the WTO chair's text on fisheries subsidies.⁸ There is no specific provision that involves outside experts in the dispute settlement procedure, other than what is provided under the DSU.⁹ However, the provisions of AFS, in substance, necessitate both the expertise of the WTO and fisheries management regimes to resolve a dispute over prohibited fisheries subsidies effectively. As will be discussed below, the determination of prohibited subsidies involves two main parts, each requiring an assessment made by the involved regime—one trade, the other fisheries management.

The environmental objectives of the AFS, combined with its reliance on the WTO's expertise in subsidy management, significantly impact the design of its legal provisions, particularly the ones on prohibited fisheries subsidies. The AFS provides three types of prohibited subsidies: subsidies contributing to IUU-fishing under Article 3, subsidies regarding overfished stocks under Article 4, and subsidies to fisheries outside of the jurisdiction of a coastal member or non-member and outside the competence of a relevant RFMO/A under Article 5. Although part of these disciplines relies on the WTO's core expertise in subsidy management, this is insufficient. Since the primary goals of these disciplines, i.e., the sustainability objectives, are beyond the WTO's competence and expertise, the AFS incorporates external regimes into these provisions. A partnership between these regimes and the WTO is crucial for the success of these disciplines.

One example of regime interaction involving a fisheries management regime is the determination of IUU fishing. The definition of IUU-fishing is provided in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing adopted by the UN Food and Agriculture Organization (FAO) in 2001.¹⁰ The adoption of external norms is itself an example of regime interaction. However, it should be noted that the WTO panels do not use this definition to make their own determinations of the existence of IUU fishing. Instead, the relevant disciplines involve complex processes, partially involving determinations made by various entities like the coastal Member, flag State Member, or the relevant RFMO/A. These entities make the relevant determinations regarding IUU fishing. This structure leads to deeper regime interactions in FSA's dispute settlement procedure. WTO panel decisions may need to consider determinations previously made by various fisheries organizations outside the WTO based on non-trade rules and practices. The structure of the legal provisions regarding fisheries

⁷ AFS, Article 10.1.

⁸ Draft Consolidated Chair Texts of the AD and SCM Agreements, Annex VIII, Fisheries Subsidies, Article III.2(b), TN/RL/W/213 (Nov. 30, 2007).

⁹ DSU, Article 13.

¹⁰ AFS, fn 4.

subsidies enables this regime interaction and partnership between the regimes demonstrated in the AFS's dispute settlement process.

(1) Subsidies contributing to IUU fishing and regime interaction

One of the major achievements of the AFS is the prohibition of subsidies contributing to IUU fishing. Article 3.1 of the AFS stipulates, "No Member shall grant or maintain any subsidy to a vessel or operator engaged in illegal, unreported and unregulated (IUU) fishing or fishing related activities in support of IUU fishing." Article 3.2 further provides that the vessel or operator that receives subsidies shall be considered to be engaged in IUU fishing if an affirmative determination is made by a coastal Member (for activities in areas under its jurisdiction), a flag State Member (for activities by vessels flying its flag), or a relevant RFMO/A in accordance with the rules and procedures of the RFMO/A and relevant international law (in areas and for species under its competence). Under this structure, a fisheries subsidy constitutes IUU fishing subsidies only when the subsidy at issue is granted to a vessel or operator that has been determined by a coast member, a flag state member, or a relevant RFMO/A to be engaged in IUU fishing. The determinations made by the fisheries management regimes are parallel and independent from each other.¹¹ An affirmative decision of one entity is not negated by a negative determination made by another entity.¹² If there are more than one such determination, a WTO panel does not need to choose between them or otherwise pass judgment on the substantive correctness of these determinations.¹³ Recognizing that the WTO lacks the expertise to make such determinations, the AFS delegates part of the core elements' determination to authorities or institutions outside the WTO. To prevent unrestrained delegation, the AFS prescribes requirements for such determinations.

Regime interaction will therefore occur in the dispute settlement process regarding prohibited IUU fishing subsidies. Should a dispute occurs, for example, when a WTO member brings a claim against another member for granting IUU fishing subsidies, the panel tasked to resolve the dispute will have to determine whether the subsidy at issue constitutes prohibited subsidies under the AFS Article 3. This determination can be divided into two major parts.

First, the panel will examine if the subsidy at issue falls within the scope of AFS under Article 1. This involves three elements. (1) The subsidy at issue has to fall within the meaning of ASCM Article 1.1.¹⁴ (2) The subsidy at issue has to be specific within the meaning of Article 2 of the ASCM.¹⁵ (3) The subsidy is granted to marine wild capture fishing and fishing related activities at

¹¹ Juan He, *A Jurisdictional Assessment of International Fisheries Subsidies Disciplines to Combat Illegal, Unreported and Unregulated Fishing*, 14 SUSTAINABILITY 14128, 5 (2022).

¹² *Id.* at 6.

¹³ *Id.* at 5.

¹⁴ AFS, Article 1.

¹⁵ *Id.*

sea. Particularly for the first two elements, the panel is expected to make determinations based on the disciplines of ASCM, i.e., the WTO's expertise.

The second part of the determination, under Article 3, requires the panel to verify if an affirmative determination made by entities or institutions as per Article 3.2 exists and if so, whether it complies with the requirements provided therein. In this case, the panel is not tasked with making its own decisions but rather verifying the presence of a qualified determination made by a fisheries management regime. The final decision on whether the measure in question constitutes prohibited subsidies can only be made by combining the results of both parts of the determination.

There is a significant difference between these two core parts of an IUU subsidy determination. For the first part, the panel makes its own determinations, but for the second part, the panel ascertains the existence of a qualifying determination made by an external fishing management regime which is not made in accordance with WTO rules. These determinations are not made according to WTO rules. The decisions made by the fisheries management regime thus directly interact with the WTO's dispute settlement process, constituting a form of regime interaction.

It is probably appropriate to address the scope of the term regime interaction here. This paper adopts a broad definition of regime interaction, which refers to the interaction between the WTO and a fisheries management regime external to the WTO. The term "regimes" is not confined to international organizations, but extends to any autonomous decision-maker in the field of fisheries management that operates outside the WTO's structure. RFMOs as part of UNCLOS regime.¹⁶ In addition, RFMOs can also be considered individual regimes.¹⁷ Whether the decision is made by an RFMO/A or by a coastal Member or flag State Member, it involves regime interaction. This remains true even though these states are WTO members because the decision in question is not made in accordance with a WTO norm, leading the application of the WTO disciplines to partly depend on an external norm.¹⁸

For instance, consider the prohibition of IUU fishing under Article 3 of the AFS. Article 3 of the AFS prohibits the granting or maintenance of any subsidy to a vessel or operator engaged in IUU fishing or fishing-related activities in support of IUU fishing. According to footnote 4 of AFS, IUU fishing refers to activities set out in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing¹⁹ adopted by the UN Food and Agriculture Organization (FAO) in 2001. The 1982 United Nations Convention on the

¹⁶ MARGARET A. YOUNG, TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW 39 (2011) (Noting that RFMO/As are "supported by UNCLOS and can be conceived as part of its legal regimes.").

¹⁷ *Id.* ("Yet given their separate normative and institutional basis, and the specific issue-areas originally sought to be addressed by RFMOs, it is also useful to consider them as independent regional regimes.").

¹⁸ *Id.* at 28 (citing Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.).

¹⁹ FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, <https://www.fao.org/3/Y1224E/y1224e.pdf> (accessed on 13 July 2023).

Law of the Sea (UNCLOS)²⁰ sets forth the jurisdictions of coastal States and flag States within the international legal framework for fisheries management.

Footnote 7 of the AFS clarifies and confirms that the competence of the decision makers is not provided under the WTO rules by stipulating, "Nothing in this Article shall be interpreted as affecting the competence of the listed entities under relevant international instruments" Footnote 8 adds that Article 3 "shall be interpreted to . . . affect the validity or enforceability of . . . an IUU fishing determination," further emphasizing that the validity or enforceability does not come from or is not affected by Article 3 of AFS.

Such affirmative determinations made by a coastal Member or a flag State Member are made in accordance with fisheries-related rules in their capacity as fisheries management regime, not as a WTO member. Therefore, even in the context of determinations made by coastal Member or flag State Member, regime interaction between the WTO and a fisheries management regime occurs when the panel proceeding involves such determinations. The same situation applies to other prohibited subsidies.

(2) Subsidies regarding overfished stocks

The second category of prohibited fisheries subsidies is subsidies regarding overfished stocks. Under Article 4.1, "No Member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock." Similar to the prohibited IUU fishing subsidies, the prohibition of overfished stocks subsidies is for the purpose of preserving ocean sustainability. Similar to IUU fishing subsidies, to constitute the prohibited overfished stocks subsidies, the subsidies must satisfy two core parts: First, the subsidy must fall within the scope of AFS as provided under Article 1 of AFS. Second, the subsidy is one that is "for fishing or fishing related activities regarding an overfished stock." The first part is identical to that for IUU fishing subsidies, requiring the panel to determine the relevant elements under Article 1 in the event of a dispute.

The second part of the determination under Article 4 requires the subsidy in question to meet the following criteria to be classified as an overfished stocks subsidy: First, the subsidy is granted or maintained "for" certain fishing or fishing related activities. Second, the fishing or fishing related activities have to be regarding an overfished stock. The first requirement entails ambiguities as the term "for fishing or fishing related activities" can be interpreted to various degrees of connection between the subsidies and the fishing or fishing related activities, causing some ambiguity. Disputes may arise over whether it suffices for the subsidy to contribute to certain fishing or fishing related activities, or if the subsidies should be explicitly granted to such activities, i.e., with the stated intent to promote overstocked fishing. Considering the ASCM's practice regarding export subsidies as well as the sustainability objectives of the AFS, the first interpretation appears reasonable.

²⁰ UN, United Nations Convention on the Law of the Sea, https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed on 13 July 2023).

The second element, which is relevant to the purpose of this paper, is that under Article 4.2, "a fish stock is overfished if it is 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." Here, the subsidy at issue constitutes prohibited overfished stocks subsidy only when a coastal Member or a relevant RFMO/A recognizes as such, leading to regime interaction between the WTO and a fisheries management regime.

In addition, Article 4.3 provides an exception to the prohibition, stating that "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." Footnote 11 to AFS provides that "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 such as maximum sustainable yield (MSY) or other reference points, commensurate with the data available for the fishery; or by a relevant RFMO/A in areas and for species under its competence." Here, for a panel to determine whether the exception applies, a coastal Member or a relevant RFMO/A's determination of a biologically sustainable level is required, which similarly entails regime interaction in the AFS's dispute settlement procedure.

(3) Subsidies to fisheries outside of the jurisdiction of a coastal Member or non-member and outside the competence of a relevant RFMO/A

Article 5.1 of the AFS provides the third category of prohibited subsidy. The provision stipulates that "[n]o Member shall grant or maintain subsidies 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 RFMO/A." Unlike the previous two types of prohibited fisheries subsidies, Article 5 does not explicitly provide any indication of who should make the determination regarding whether the fishing or fishing related activities are outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant RFMO/A. One interpretation posits that it is the panel hearing the dispute that should make the determination. However, this interpretation could lead to situations where the panel's determination may be in contradiction with a determination made by the coastal Member or coastal non-Member and/or the relevant RFMO/A. Indeed, when such a determination exists, it seems reasonable for a panel to adopt it, leading to the kind of regime interaction previously described.

The discussion above illustrates that regime interaction is present in the dispute resolution process of the AFS, particularly when it comes to determining the existence of prohibited fisheries subsidies. The observed regime interaction can manifest in varying degrees of cooperation between regimes, and this will be the focus of the subsequent section. Here, the collaboration between the WTO and the fisheries management regime is necessary before a prohibited IUU-subsidy can be determined. In addition to its own expertise on subsidy-related disciplines within the WTO, a WTO panel will need to consider a determination made by a fisheries management regime based on norms pertinent to fisheries management. The following

sections will discuss the positive aspects of this approach, and the level of cooperation, and will also highlight the resulting uncertainties and concerns linked to this direction.

3. The Degree, Concerns, and Challenges of the Regime Interaction of AFS Dispute Settlement

Deepening the regime interaction at the dispute settlement level under AFS is a positive direction. However, the level of the interaction is not explicitly provided under AFS. Depending on the level of the interaction, it may raise uncertainty, challenges and legitimacy issues.

It is not the first time in the WTO where a Member's adherence to an obligation hinges on an action taken by an institution outside the WTO.²¹ In the SPS Agreement, Article 3.2 stipulates that SPS measures conforming to international standards, guidelines or recommendations 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 the SPS Agreement and of GATT 1994. Here, international standards, guidelines or recommendations established by the Codex Alimentarius Commission, the International Office of Epizootics, the Secretariat of the International Plant Protection Convention, and other relevant international organizations open for membership to all Members, as identified by the SPS Committee provide the basis for a panel's legal determination regarding an SPS measure at issue.²² The reliance of the international standards, guidelines or recommendations serves to "harmonize [SPS] measures on as wide a basis as possible."²³ WTO members are not legally required to adopt the international standards, guidelines or recommendations. Instead, the conformance with the standards, guidelines or recommendations satisfies a member's obligation under Article 2.2 of the SPS Agreement regarding the necessity requirement, as well as the requirement under Article XX(b).

The reliance on a fisheries management regime's determination is different. When such determination comes into play under the AFS in the context of the existence of prohibited fisheries subsidies, they are not adopted as justification to reduce the obligations of the WTO Member. Instead, once those determinations exist, Members are prohibited from providing subsidies to the relevant fishing or fishing related activities. This is the first time a WTO norm explicitly adopts a legal obligation based on a determination made outside of the WTO to achieve environmental purposes. Indeed, this is the first time WTO adopts an obligation in pursuit of environmental purposes. The decisions of external regimes are not used to reduce the obligations of the WTO Members. They are part of the obligations.

As the external regimes' determinations are part of the WTO obligations, panels must rely on them when making prohibited fisheries subsidy determinations. On the one hand, this elevates them to a much higher level of importance in terms of procedure in the WTO. On the other

²¹ Joost Pauwelyn, *Non-Traditional Patterns of Global Regulation: Is the WTO "Missing the Boat"?*, FACULTY SCHOLARSHIP (2004).

²² SPS Agreement, Annex A, Article 3.

²³ SPS Agreement, Article 3.1.

hand, these decisions are critical for the establishment of prohibited subsidies under the WTO in terms of substance. The elevated importance is an acknowledgment that in its pursuit of environmental objectives, certain parts of the endeavor are outside of the expertise of the WTO, and regime interaction and a higher level of reliance on outside regimes are necessary.

The acknowledgment and the level of integration of the external regimes' determination within the WTO obligations represent a significant step forward. It is necessary to achieve environmental and sustainability goals. While it is a positive step, the progress also brings uncertainties, concerns, and challenges regarding the relationship between WTO panels and the decision-makers of the external fisheries management regimes. The following sections of this paper will examine these issues.

3.1. Relationship Between WTO Panels and Fisheries Management Regimes in the Determination of Prohibited Fisheries Subsidies: A Standard of Review Issue

Given that the determinations made by these regimes form a necessary part of the prohibited fisheries subsidies, WTO panels must base their characterization of the fisheries subsidies on these regimes' determinations. This introduces the issue of the standard of review. Could WTO panels arrive at different conclusions from those made by these regimes? If so, under what conditions? The standard of review issue is a critical aspect of the inquiry regarding the relationship between WTO panels and fisheries management regimes.

This issue shares some similarities with the panel review of WTO members' decisions in trade remedy cases or members' risk assessment in SPS cases. In those cases, the object of the review is determinations made by others, which should have a bearing on the standard of review. For example, in the context of the SPS, WTO jurisprudence has established that when reviewing a risk assessment, a panel's role was "not to determine whether the risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable."²⁴ The review standard varies depending on the provision at issue, but the structure of the provisions indicates that the panel's role in these circumstances is not to determine the substantive correctness of the decision, but rather the procedural integrity of the decision process. In other words, panels should not make a *de novo* review here.²⁵

However, the review under the AFS is different from those in the WTO cases in a significant aspect: in those cases, the members' decisions are the object of review. There, the point is to assess whether the members' decisions are consistent with their WTO obligations. For example, an antidumping investigation has to comply with the requirements under the ADA. In contrast, under the AFS, the fisheries regimes are not subject to the rules of the WTO. Instead, the regimes are supporting the WTO in its pursuit of sustainability objectives. This fundamental difference would lead to different roles of the determinations in the panel's assessment. The AFS

²⁴ Appellate Body Report, United States—Continued Suspension of Obligations in the EC—Hormones Report, WT/DS320/AB/R, ¶1590 (Oct. 16, 2008).

²⁵ AB Report, EC—Meat and Meat Products, DS26, DS48, ¶117.

does not impose any obligations on the fisheries management regimes when making those determinations. Their determinations are made in parallel to the AFS.

Both sides of the issue have been addressed in the explanatory note of the Chair of the Negotiating Group on Rules accompanying the draft Agreement on Fisheries Subsidies.²⁶ As the Chair's note discussed, the issue of the standard of review has been raised during the negotiations of AFS. The discussion is based on the agreement of WTO Members that the WTO is not a fisheries management organization, and accordingly "WTO dispute settlement should not conduct *de novo* reviews of fisheries specific matters such as stock assessments or IUU determinations."²⁷ This supports the reading that AFS does not allow panels to make their own IUU or overfished status determinations. To address this issue, some Members suggested adding separate standard of review provisions. The other view is that a separate standard of review provision is not needed as the textual drafting of the disciplines themselves would provide the applicable standard of review for each provision. The discussed example is Article 3.3. Article 3.3 provides the procedural steps for the IUU determination by a coastal Member, which forms what would be reviewable in a dispute regarding an IUU determination, "rather than the substantive foundation of that determination."²⁸ In other words, the panel review should be focus on the process of the decision making.

While this discussion regarding the object of review is critical in determining the proper standard of review is correct, it does not fully address the issue of the standard of review. After determining that the object of the panel review is the procedural steps for the IUU determinations by a coastal Member, the intensity or rigidity of the panel review still leaves a high level of uncertainty. A procedural inquiry, while avoiding adjudicating on the substantive decisions themselves, is not necessarily a more deferential review standard. A critical and intrusive review of the procedural requirements may still lead to a very critical review. Take Article 3.3 for example, which provides that one of the requirements for the prohibition under Article 3.1 to apply is that the IUU determination by the coastal Member is "based on relevant factual information." Whether the IUU determination is based on relevant factual information is an object of panel review. The panel could look into the factual basis of the IUU determination in order to determine whether the basis is indeed factually correct, the relevancy of the factual basis, and the relation between the determination and the factual basis and whether it is consistent with the "based on" requirement. The panel could potentially look into whether the coastal Member omits certain factual basis. While it is procedural in nature, the panel could adopt a rigid review of the evidence considered in determination as well as their weighing and balancing. The application of the standard of review that focuses on processes could result in "detailed scrutiny" that is still close to *de novo* review.²⁹ The AFS texts do not provide sufficient guidance on this

²⁶ WT/MIN(21)/W/5/Add.1, Nov. 24, 2021.

²⁷ *Id.* at ¶ 114.

²⁸ *Id.*

²⁹ Jacqueline Peel, *Of Apples and Oranges*, 61(2) ICLQ, 427, 429 (on review of risk assessment); Tsai-fang Chen, *Risk Assessment Review Under the WTO Dispute Settlement System*, 14(2) Asian Journal of WTO & International Health Law and Policy 445 (2019).

critical issue that has a huge impact on the relationship between WTO and fisheries management regimes. The standard of the review is indeed at the heart of the regime interaction in the AFS's dispute settlement.

Here, a proper standard of review would require the panel not to adopt a standard that is too intrusive. The object of review analysis should prevent the panel from substituting its own determination with the decision of a coastal Member. Regarding the more difficult issue of the proper level of standard of review, this paper argues that a deferential review standard is warranted. As the standard of review issue is at the heart of the relationship between WTO and fisheries management regimes, the issue should be informed by this relationship. This paper observes that the relationship between WTO and the fisheries management regime is that of a partnership. Both of them contribute their capacity and expertise in their pursuit of ocean sustainability. As the IUU determination falls within the expertise of the side of fisheries management, a more deferential standard is warranted in light of this relationship.

While this paper argues that the nature of regime interaction here informs the proper standard of review to be a deferential one, the standard should not be "total deference," either. This is a term adopted by the Appellate Body to indicate one of the extremes of the spectrum. Regime interaction in the AFS dispute settlement could provide certain concerns as well. A "total deference" would not be able to address those concerns, which will be dealt with in the next section.

3.2. Determining the Relationship between the WTO Panels and the Fisheries Management Regimes

Regime interaction in the AFS's dispute settlement leads to some concerns with different choices regarding the applicable standard of review. On the one hand, if a standard of review that is too intrusive is chosen, as WTO panels do not possess expertise in fisheries management, the objective of regime interaction will be defeated, and the partnership of WTO and fisheries management regimes cannot materialize. On the other hand, if a review standard that is too deferential is chosen, due process concerns may arise. As the requirements of the fisheries management regimes' determinations are procedural in nature, a violation of a procedural requirement such as due process should signal situations that a panel should weigh in. This paper argues that a panel should intervene when due process concerns arise in the fisheries management regimes' determinations. If the basis for a proper partnership between the WTO and the fisheries management regime has been undermined, then the regime's determination should not be relied upon by the panel at issue in its determination of a prohibited fisheries subsidy. This is crucial to ensure the legitimacy of the process.³⁰

The determinations of relevant fisheries management regimes provide functions of supporting the prohibited subsidy determinations made by panels. This informs the optimal relationship between the WTO and the fisheries management regime, which should be a partnership, as

³⁰ See Pauwelyn, *supra* note 22 at 20–21.

indicated by the legal design of the prohibited fisheries subsidies. In addition, to some degree, the standard of review as indicated in legal provisions should inform the optimal relationship as determined by WTO members.

One important indication of the legal provisions provide regarding the standards of review is the status of the fisheries management regime. A decision made by RFMO/A or by a coastal Member is treated differently in the AFS. For an IUU determination made by a RFMO/A, the requirement stipulated under AFS Article 3.2(c) is that the affirmative determination is made "in accordance with the rules and procedures of the RFMO/A and relevant international law, including through the provision of timely notification and relevant information, in areas and for species under its competence." For a decision made by a coastal Member, the determination must be "based on relevant factual information" and consistent with the procedural requirement under AFS Article 3.3(b) regarding various notification requirements and the affordance of the opportunity to exchange relevant information prior to a determination.

The difference in the review standard is informed by various due process requirements. In an ideal world, under the current dispute settlement mechanism of the AFS, for a panel to adopt determinations of fisheries management regimes, due process should be kept in mind when determining whether these determinations should be adopted. Without a clear indication of a violation of due process that questions the integrity of the decision-making in the external regimes, the panel should refrain from engaging in a factual weighing and balancing of evidence or an application of the laws outside of the WTO.

However, this vision could risk proving to be naïve in the geopolitical reality. This partnership would require strong confidence to be put in the decision-making process outside of the WTO. With the geopolitical tension and "the weaponization of everything,"³¹ it is not inconceivable that IUU determinations, among others, are used as a tool of economic coercion. Due process and (traditionally weak) good faith review may not be sufficient to sufficiently counter such misuse of IUU determinations. It can be deeply unsettling to consider the possibility that a theoretically possible biased RFMO/A or a single Member may possess the ability to cause serious disruption in a Member's fishing operations through the dispute settlement of the WTO.

While it may not be feasible to ask the WTO to establish its own IUU determinations, mechanisms should be introduced to identify and prevent the weaponization or otherwise misuse of the IUU determinations. Accordingly, this paper calls for a more engaging role of the WTO in the disputes under AFS. It should be WTO panels' responsibility to actively identify any problems associated with the lack of due process and good faith in IUU determinations. Panels should be provided the authority of fact-finding with regard to the IUU determination process. In the future, mechanisms should be introduced to enhance the collaboration between the WTO and fisheries regimes to prevent the misuse of the IUU determinations.

³¹ MARK GALEOTTI, *THE WEAPONIZATION OF EVERYTHING: A FIELD GUIDE TO THE NEW WAY OF WAR* (2022).

4. Conclusion

In conclusion, the successful conclusion of the AFS heralds a promising new direction for the WTO. The AFS is a clear demonstration that meaningful consensus can be achieved in the WTO's multilateral negotiations, particularly those embracing environmental objectives. This significant accomplishment could serve as a hope for the future of the global trading system.

Central to the success of the AFS has been the innovative implementation of regime interaction and partnership. The agreement has leveraged the expertise and capacity of both the WTO and fisheries management regimes, demonstrating that regime interaction can be effectively adopted and regime partnership achieved. The regime interaction underpinning the AFS offers a paradigm shift in how the WTO could structure future new-generation agreements. This approach could help inject new dynamism into the global trading system. However, this new direction also introduces unique challenges, particularly around adopting the optimal standard of review in dispute settlements and ensuring due process. Managing these concerns effectively will be pivotal to adhering to the cooperative approach and combining the strengths of different regimes, while ensuring the integrity and effectiveness of the agreement.

In sum, the AFS is a landmark in the evolution of the WTO, signaling a shift towards integrating environmental sustainability into its framework and emphasizing the importance of regime partnerships. The implementation of the AFS dispute settlement procedure should ensure the realization of the ideals.