

**National Interest Analysis [2023] [ATNIA 6]
with attachment on consultation**

**Protocol Amending the Marrakesh Agreement Establishing the World Trade
Organization
Agreement on Fisheries Subsidies
(Geneva, 17 June 2022)
[2023][ATNIF 6]**

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization Agreement on Fisheries Subsidies

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Nature and timing of proposed treaty action

1. The proposed treaty action is for Australia to accept the Protocol Amending the Marrakesh Agreement establishing the World Trade Organization (WTO) (the “Protocol”), adopted on 17 June 2022 in Geneva, Switzerland, during the during the 12th WTO Ministerial Conference (MC12). The Protocol will amend the Marrakesh Agreement Establishing the World Trade Organization (the “WTO Agreement”) by inserting the Agreement on Fisheries Subsidies (the “Agreement”).
2. Paragraph 3 of Article X of the WTO Agreement provides that the Protocol, which annexes the Agreement shall enter into force for the WTO Members that have accepted the Protocol upon acceptance by two thirds of WTO Members.
3. The Protocol would amend the WTO Agreement by inserting the new Agreement into Annex 1A, which contains the WTO multilateral agreements on trade in goods. The Agreement will be placed after the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”) in Annex 1A.
4. It is proposed that Australia lodge its letter of acceptance as soon as practicable following consideration by the Joint Standing Committee on Treaties (JSCOT) and subsequent submission to the Federal Executive Council for authorisation.

Overview and national interest summary

5. Australia’s acceptance of the Agreement will provide legally binding rules for fisheries-specific subsidies concerning marine wild capture fishing and fishing related activities at sea. The scope of the Agreement excludes aquaculture and inland fishing.
6. The Agreement prohibits subsidies to a vessel or operator engaged in illegal, unreported and unregulated (IUU) fishing, as well as subsidies for fishing of overfished stocks and unregulated high seas fishing. In doing so, the Agreement makes a significant contribution towards ocean sustainability and seeks to address the serious decline of global marine capture fisheries resources, which is critical to ensuring global food security and protecting livelihoods.
7. Australia’s objectives in pursuing the Agreement are two-fold. First, it is important to secure an agreement which addresses the sustainability of the world’s global marine capture fisheries resources, particularly in the Pacific region. According to the latest available data

from the Food and Agriculture Organization of the United Nations (FAO)¹, the percentage of fish stocks at biologically unsustainable levels increased to 35.4 per cent in 2019 from 34.2 per cent in 2017. This compares to 10 per cent in 1974². Rebuilding overfished stocks to enable them to be harvested at their maximum sustainable yields could increase global fish production by 16.5 million tonnes and annual earnings by US\$32 billion. The FAO has also observed that ensuring sustainable fish stocks seems more critical for highly migratory stocks, straddling stocks and other fisheries resources that are fished solely or partially in the high seas.

8. Pacific Island Members have assessed that the new Agreement will assist with addressing the subsidies that are contributing to the illegal fishing occurring in the Pacific region (a 2021 report by MRAG estimated that US\$333 million is lost to IUU fishing in the Western and Central Pacific region)³.
9. Second, it is important to secure an agreement that protects Australia's commercial interests and notably this Agreement is consistent with Australian policies and positions relating to healthy oceans, the blue economy and Australian fisheries harvesting policies.
10. Australia's wild capture fisheries production (i.e. excluding the growing aquaculture sector) was valued at AU\$1.4 billion in 2021 (ABARES 2022)⁴.

Reasons for Australia to take the proposed treaty action

11. The Agreement delivers on the mandate from the 11th WTO Ministerial Conference and UN Sustainable Development Goal Target 14.6:

“... to prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminate 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 [the WTO] negotiations.”
12. The Agreement sets out new disciplines for fisheries subsidies, which address aspects of sustainable fisheries and fishing and reinforces Australia's existing sustainable fisheries harvesting policies. The Agreement also seeks to dissuade unsustainable fishing and penalise illegal fishing, which has positive impacts on legal and regulated fishing, by enabling stock replenishment and increased returns for Australian fishers.
13. The Agreement also has significant strategic value in the Pacific region, recognizing that this Agreement is a core priority for the Pacific at the WTO. It underpins sustainable fisheries management regimes and practices, and acts as a deterrent for unsustainable, IUU fishing in the Pacific region. Australia and Pacific Island Members played a significant

¹ FAO, 2022, *The State of the World Fisheries and Aquaculture 2022. Towards Blue Transformation*, Rome, FAO. <https://doi.org/10.4060/cc0461en>

² FAO, 2014, *The State of the World Fisheries and Aquaculture 2014*, Rome, FAO.

³ MRAG Asia Pacific (2021). *The Quantification of Illegal, Unreported and Unregulated (IUU) Fishing in the Pacific Islands Region – a 2020 Update*.

⁴ Tuynman, H and Dylewski, M 2022, *Australian fisheries and aquaculture statistics 2021*, Fisheries Research and Development Corporation, ABARES, Canberra, December, DOI: <https://doi.org/10.25814/amdt-x682>

role in driving the conclusion of the Agreement at MC12 on this important issue to the Pacific region.

14. Australia has been an active proponent and leader of the WTO negotiations on fisheries subsidies that led to the new Agreement. Subsequently, Australia has actively encouraged other WTO Members to complete their domestic processes to allow the Agreement to enter into force and allow the benefits to commence, particularly in relation to ocean sustainability.

Obligations

Subsidies contributing to IUU fishing

15. Article 3 of the Agreement prohibits subsidies to a vessel or operator engaging in IUU fishing or fishing related activities in support of IUU fishing. This subsidy prohibition is triggered when an affirmative (i.e. final) IUU determination is made by a coastal Member, a flag State Member or a relevant Regional Fisheries Management Organization/Arrangement (RFMO/A), within their respective competences. The Agreement does not affect the competence of these entities under relevant international instruments or change their rights in making IUU fishing determinations.
16. The Agreement also sets out the procedural steps governing IUU fishing determinations by a coastal Member. These include the obligations of the coastal Member vis-à-vis the flag State Member and, where known, to the subsidising Member concerning timely notification and an opportunity to exchange relevant information before a determination is made, as well as notification of the final determination and any sanctions applied.
17. The Agreement requires the subsidising Member, in setting the duration of the prohibition resulting from an affirmative IUU fishing determination, to take into account the nature, gravity and repetition of the IUU fishing that was committed by the vessel or operator. The Agreement further provides that the prohibition of the offending subsidy resulting from the affirmative determination is to apply for at least as long as the sanction on the vessel or operator resulting from the IUU fishing determination remains in force, or at least as long as the vessel or operator is listed by an RFMO/A, whichever is the longer.
18. The Agreement provides for additional WTO notification obligations, including notifying affirmative IUU determinations to the newly established WTO Committee on Fisheries Subsidies (“Fisheries Committee”).

Subsidies regarding overfished stocks

19. Article 4 of the Agreement prohibits subsidies for fishing or fishing related activities regarding a stock in an overfished condition as determined and recognised as such by a coastal Member under whose jurisdiction the fishing is taking place or by a RFMO/A acting within areas and for species under its competence. This must be based on the best scientific evidence available to the coastal Member or RFMO/A.

20. As an exception to this prohibition, subsidies may be provided if they are intended to rebuild the stock to a biologically sustainable level or other measures may be implemented for this purpose.

Subsidies for unregulated high seas fishing

21. The Agreement also contains a further core discipline which prohibits subsidies for fishing or fishing related activities in the unregulated high seas (Article 5.1). This covers fishing occurring outside of any coastal Member's or coastal non-Member's jurisdiction and outside the competence of a relevant RFMO/A.

Other subsidies

22. The Agreement requires that Members take special care and due restraint when granting subsidies to vessels not flying that Member's flag (Article 5.2). The Agreement clarifies that a subsidy is attributable to the Member conferring it, regardless of the flag or registry of any vessel involved or the nationality of the recipient (footnote 3).
23. In addition, the Agreement also requires Members to take special care and to exercise due restraint when granting subsidies to fishing or fishing related activities regarding fish stocks with unknown status (Article 5.3).
24. An exception to the above prohibited subsidies is provided for in relation to subsidies for disaster relief, noting this does not apply to economic or financial crises. This applies to all Members and the Agreement sets out the associated conditions for such subsidies, including in relation to reconstruction subsidies. In particular, the Agreement provides that such a subsidy must be limited to the relief of a particular disaster, geographic area and time period, and in the case of reconstruction subsidies, limited to restoring the affected fishery and/or fleet to its pre-disaster level.

Other provisions

25. Article 7 of the Agreement provides for technical and capacity building assistance for developing country Members, including Least Developed Country (LDC) Members, for the purpose of implementing these disciplines. It also refers to the establishment of a voluntary WTO funding mechanism and confirms that contributions of WTO Members to such mechanism shall be exclusively made on a voluntary basis and not utilise regular budget resources.
26. Article 8 of the Agreement contains important notification and transparency provisions, which operate in addition to the existing notification and transparency obligations under the SCM Agreement. It requires Members to notify, as part of the regular notification of fisheries subsidies under the SCM Agreement, information on the type and kind of fishing activity for which a notified subsidy is provided (Article 8.1(a)). To the extent possible, it also requires that Members provide certain information pertaining to the status of fish stocks in the fishery for which the subsidy is provided, conservation/management measures in place for the relevant fish stock, fleet characteristics in the fishery for which the subsidy is provided, identification of the vessels benefitting from the subsidy, and species-level catch data (Article 8.1(b)). The Agreement also requires Members to notify to the Fisheries Committee a list of vessels and operators that have been affirmatively determined to be

engaged in IUU fishing; information relating to a Member's implementation and administration of the Agreement (Article 8.3); information relating to a Member's fisheries regime including relevant laws, regulations and administrative procedures relevant to this Agreement (Article 8.4); and notification of RFMO/As to which a Member is a party (Article 8.6). Nothing in Article 8, however, requires the provision of confidential information (Article 8.8).

27. Article 9 of the Agreement establishes the Fisheries Committee composed of representatives from each WTO Member to carry out responsibilities under the Agreement. This includes reviewing the implementation and operation of the Agreement annually. The Fisheries Committee must, by no later than five years after entry into force of the Agreement, and every three years thereafter, review the substantive operation of the Agreement to identify necessary modifications to improve its operation.
28. The Agreement will be enforceable through the WTO dispute settlement system (Article 10). The Agreement clarifies that the dispute settlement rules for prohibited subsidies in the SCM Agreement apply to the subsidies prohibited under Articles 3, 4 and 5 of the Agreement, while the WTO Dispute Settlement Understanding applies to the rest of the Agreement's provisions (Article 10.2).
29. There are two-year "peace clauses" for WTO disputes relating to subsidies granted by developing country and LDC Members for IUU fishing and for fishing of overfished stocks in their Exclusive Economic Zones (Articles 3.8 and 4.4). This means that developing country and LDC Members will be exempt from dispute settlement actions during this period for these subsidies.
30. Neither the content of the Agreement nor its operation will have any legal implications regarding territorial claims or delimitation of maritime boundaries, including in the context of any dispute settlement under Article 10 of the Agreement (Article 11.2).
31. Further, nothing in the Agreement is to be construed or applied to prejudice the jurisdiction, rights, and obligations of Members under international law, including the law of the sea, and rules and procedures of RFMO/As (Article 11.3). The Agreement provides that rights and obligations under the SCM Agreement are not affected.
32. The Agreement further states that other than as provided in the Agreement, there is no implication that a Member is bound by measures or decisions of, or recognises, any RFMO/A of which it is not a party or cooperating non-party (Article 11.4).
33. Lastly, the Agreement provides that if comprehensive disciplines are not adopted within four years of entry into force, the Agreement is terminated unless WTO Members decide otherwise (Article 12).

Implementation

34. No changes are required to any domestic legislation for implementation of the Agreement. Consistent with Article 3.7 of the Agreement, all obligations can be implemented through administrative procedures.

35. The obligations concerning subsidies contributing to IUU fishing, fishing of overfished stocks and unregulated high seas fishing do not require amending Australian domestic legislation because Australia's fisheries-specific subsidies are not provided for in any domestic legislation but are established and implemented through policy and administrative processes. Specifically, these obligations can be implemented through minor administrative amendments, including to the eligibility requirements for current subsidy programs which are provided under Commonwealth or State/Territory departmental budgets.

Other subsidies

36. No domestic implementing legislation is required to comply with the obligations to take special care and restraint when granting subsidies to vessels not flying Australia's flag, and to fishing or fishing related activities regarding fish stocks with unknown status. They can be implemented through the design of subsidies by the administrators of the subsidy program.

Notification and transparency obligations

37. The notification and transparency obligations required by the Agreement build on Australia's existing subsidy notification obligations under the SCM Agreement, including the existing obligation to notify fisheries specific subsidies. WTO Members notify subsidy programs every two years.

38. No implementing legislation is required to comply with the additional notification obligations. Australia will be required to notify additional information under the existing regular subsidy notification to the WTO SCM Committee as well as notifying certain information to the new Fisheries Committee. These subsidy notifications are publicly available and published on the WTO's website. In terms of the latter Committee, Australia will be required to notify the following: how it has implemented its obligations, in particular in relation to the subsidy prohibitions; a description of Australia's fisheries regime and laws, regulations and administrative procedures, which may be done via electronic link to an official webpage; on an annual basis, a list of vessels and operators that Australia has affirmatively determined as having been engaged in IUU fishing; and any RFMO/A to which Australia is a party.

Costs

39. The financial costs to comply with the Agreement would be limited, and would be confined to additional paperwork for agencies administering subsidy programs, whether at Commonwealth or State/Territory level, particularly in relation to the additional eligibility requirements to be set for applicants for subsidy programs. This would also include the administrative costs of collating and formatting existing data to prepare fisheries subsidy notifications.

Future treaty action

40. There is no provision in the Agreement to govern amendments to the Agreement, although the Fisheries Committee may submit to the Council for Trade in Goods proposals to amend the text of the Agreement (Article 9.4). Procedures for the amendment of multilateral

agreements under Annex 1A of the WTO Agreement are provided under Article X of the WTO Agreement, and differ depending on whether an amendment alters the rights and obligations of Members. Amendments that would alter the rights and obligations of Members take effect for Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member when they accept it, while amendments that would not alter the rights and obligations of Members take effect for all Members upon acceptance by two thirds of the Members. No reservations may be made in respect of any provisions of the Protocol.

41. The Protocol refers to WTO Ministerial Decision (WT/MIN(22)/33), which foreshadows further negotiations occurring to achieve a comprehensive agreement on fisheries subsidies, including through further disciplines on certain forms of fisheries subsidies that contribute to overcapacity and overfishing. This is also reflected in Article 12 of the Agreement which confirms the Agreement will terminate if comprehensive subsidy disciplines are not adopted within four years of the Agreement entering into force and unless WTO Members decide otherwise.
42. Any new treaty or amended Agreement would be subject to Australia's domestic treaty-making requirements, including tabling and consideration by JSCOT.

Termination

43. Article 12 of the Agreement provides that if comprehensive disciplines are not adopted within four years of entry into force, the Agreement is terminated immediately, unless WTO Members decide otherwise. The objective of this article is to ensure that negotiations on further disciplines, particularly in respect of subsidies contributing to overcapacity and overfishing, are completed within a reasonable time frame after the Agreement enters into force.

Contact details

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ATTACHMENT ON CONSULTATION

Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization

Agreement on Fisheries Subsidies

(Geneva, 17 June 2022)

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CONSULTATION

44. The public consultation and stakeholder engagement process for the Agreement commenced before the launch of the WTO negotiations in 2001 within the WTO's Negotiating Group on Rules as part of the WTO Doha Development Round of trade negotiations. Over the twenty-plus years of negotiations, DFAT, in conjunction with other government agencies, consulted widely with industry in formulating and engaging in the negotiations.
45. DFAT also consulted with State and Territory Governments throughout the course of the negotiations, including with the Commonwealth-State/Territory Standing Committee on Treaties (SCOT).
46. The Agreement will have a minor impact on how State and Territory agencies administer their fisheries-specific subsidy programs by requiring the imposition of additional eligibility conditions for applicants. The State and Territory agencies have been made aware of these administrative impacts as part of consultations since conclusion of negotiation of the Agreement.
47. Stakeholders were consulted on the scope of the Agreement, including where some WTO Members sought to put aside the existing WTO rules which discipline specific subsidies. These Members sought to expand the scope of disciplines to cover non-specific subsidies, including non-specific fuel subsidies which may benefit the fisheries sector. Stakeholders supported Australia's approach in these negotiations of upholding and not detracting from existing core WTO subsidy definitions and disciplines. The scope of the Agreement relates to fisheries specific subsidies; it does not discipline non-specific subsidies, including non-specific fuel subsidies that may benefit the fisheries sector.
48. Stakeholders expressed the view that minor infringements needed to be considered in terms of the discipline on subsidies contributing to IUU fishing. This is reflected in the Agreement which provides that a subsidising Member is required to 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 of a subsidy contributing to IUU fishing.
49. Stakeholders also noted concerns with impacts of distant water fishing fleets operating close to Australia's exclusive economic zone (EEZ). The Agreement prohibits subsidies for unregulated high seas fishing.

50. Throughout the negotiations, stakeholders were consulted on draft joint proposals supported by Australia with like-minded WTO Members to potentially discipline subsidies on overcapacity and overfishing. Comprehensive disciplines on such subsidies will be the subject of further WTO negotiations.

51. A list of businesses, organisations and industry peak bodies that were consulted on the Agreement is set out below:

- Australian Chamber of Commerce and Industry;
- Atlantis Fisheries Consulting Group;
- Austral Fisheries;
- Australian Southern Bluefin Tuna Industry Association;
- Commonwealth Fisheries Association;
- Fisheries Research and Development Corporation;
- MG Kailis Group;
- Seafood Industry Australia; and
- Seafood Services Australia.