

# Submission from Professor Margaret A. Young FAAL, Centre for Resources, Energy and Environmental Law (CREEL), Melbourne Law School

31 May 2023

To the Joint Standing Committee on Treaties  
Inquiry into the Protocol Amending the Marrakesh Agreement Establishing the World  
Trade Organization  
Agreement on Fisheries Subsidies (Geneva, 17 June 2022)

1. I note that the Committee does not have specific terms of reference for this inquiry. I write in support of Australia's ratification of the *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization Agreement on Fisheries Subsidies* ('the Agreement').
2. I first provide a short background to my research and expertise, before setting out support for the following three submissions:
  - Submission 1: The prohibition on subsidies for illegal, unreported or unregulated ('IUU') fishing or fishing of overfished stocks will improve sustainability.
  - Submission 2: The reform to rules relating to fisheries subsidies has received strong support from civil society.
  - Submission 3: The Agreement is consistent with regional reform efforts, including in agreements already ratified by Australia.

## Background and Context

3. As a Professor at Melbourne Law School, Fellow of the Australian Academy of Law, and member of the Centre for Resources, Energy and Environmental Law (CREEL), I have worked on international law with respect to trade, environment, climate change and the oceans for almost two decades. In June this year I will commence an Australian Research Council (ARC) Future Fellowship on 'The Blue Economy and International Law'. The Future Fellowship augments previous ARC Discovery Projects on climate change mitigation (DP110100259) and international adjudication (DP180102138). Relevant to the current inquiry is my book *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (CUP, 2011) (which was awarded the International Union for Conservation of Nature (IUCN) Academy of Environmental Law Junior Scholar Prize and the University of Melbourne Woodward Medal in Humanities and Social Sciences) and associated journal articles and book chapters.
4. The Agreement is a long-awaited and welcome outcome of the Doha Development Agenda of the World Trade Organization (WTO), which commenced in 2001.<sup>1</sup> It is by now clear that State 'aid' or 'allocation' for the building and operation of fishing vessels is highly distorting in economic terms and ecologically destructive.<sup>2</sup> Globally, it has led to too many boats fishing for too few fish. However, taxpayer dollars have also been essential in providing for sustainable livelihoods and other worthwhile

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<sup>1</sup> See generally Margaret A. Young, 'Fisheries' in Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle Van Damme (eds) *The Oxford Handbook on International Trade Law* (2<sup>nd</sup> edn) (OUP, 2022) 817.

<sup>2</sup> World Bank and the FAO, *Sunken Billions: The Economic Justification for Fisheries Reform* (Washington, DC: World Bank, 2009). See also World Bank, *The Sunken Billions Revisited: Progress and Challenges in Global Marine Fisheries* (Washington: World Bank, 2017); R. Martini and J. Innes, 'Relative Effects of Fisheries Support Policies' *OECD Food, Agriculture and Fisheries Papers No. 115* (Paris: OECD, 2018).

goals, meaning that the classification of ‘good’ and ‘bad’ fisheries subsidies is a highly contextual and sensitive one.<sup>3</sup> In seeking to formulate standards and recommended practices, proxies from outside the trade regime such as illegal, unreported and unregulated ‘IUU’ fishing and ‘overfishing’ have become important.

5. The Agreement contains a prohibition on subsidies for IUU fishing (including fishing in the unregulated high seas). There are prohibitions on subsidies granted for fishing overfished stocks. Proposed prohibitions on certain forms of subsidies that contribute to overcapacity and overfishing were deferred for future negotiations, as noted in the Ministerial Decision of 17 June 2022.

## Prohibition on subsidies for IUU fishing or fishing of overfished stocks

6. The Agreement provides that no Member shall grant subsidies to vessels engaged in illegal, unreported or unregulated (IUU) fishing (Article 3) or fishing regarding an overfished stock (Article 4). There is a separate prohibition for subsidies provided to fishing in the unregulated high seas (Article 5.1).
7. These provisions will improve sustainability by invoking trade disciplines to accompany existing fisheries management and governance techniques, including the FAO’s Port State Measures Agreement and the UN Fish Stocks Agreement.
8. The provisions were subject to extensive negotiations. One of the disagreements regarded the method to determine that vessels or operators are engaging in IUU fishing, and the reliance on ‘Regional Fisheries Management Organizations’ (RFMOs). There was suspicion by some countries that the trade regime lacked expertise and a mandate on fisheries matters.
9. In contrast, I consider it consistent with sovereignty for WTO disciplines to draw on the work and management of RFMOs in seeking to enforce rules on fisheries subsidies, in theory and in practice.<sup>4</sup>

**Submission 1:** *The prohibition on subsidies for illegal, unreported or unregulated “IUU” fishing or fishing of overfished stocks will improve sustainability.*

## Civil society input

10. There has been civil society input throughout the negotiations to reform fisheries subsidies, which include input into the UN Sustainable Development Goals (SDGs). Target 14.6 for the SDGs provides the following aim for all countries:

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

11. There are many examples of civil society input into fisheries subsidies reform. A coalition of non-governmental organizations, including WWF, Greenpeace, Oceana, and the International Union for the Conservation of Nature (IUCN), launched a global campaign to support the conclusion of a WTO

<sup>3</sup> See Margaret A. Young, ‘Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies’ (2017) 17 *International Environmental Agreements: Politics, Law and Economics* 371.

<sup>4</sup> Young, above n 1, 827-829.

agreement by the end of 2020. The ‘Stop Funding Overfishing’ campaign called on governments to ‘fulfil their commitment to curb the public money that supports overfishing and degrades our ocean’.<sup>5</sup>

12. Civil society groups are clear in their support for ratification of this Agreement. This in no way diminishes the calls by civil society for further negotiations on subsidies that contribute to overcapacity and overfishing. Those negotiations were deferred in the present round, as mentioned above (para 5).

**Submission 2:** *The reform to rules relating to fisheries subsidies has received strong support from civil society.*

## Regional reform efforts on fisheries subsidies

13. Negotiations on fisheries subsidies have led to disciplines agreed within regional integration agreements and trade agreements. The *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CP-TPP) (signed and entered into force 2018), for example, is ratified by Australia and includes a number of high-fish exporting and high-fish importing trade partners.
14. The CP-TPP prohibits subsidies ‘for fishing that negatively affect fish stocks that are in an overfished condition’.<sup>6</sup> It further prohibits subsidies ‘provided to any fishing vessel while listed by the flag State or a relevant [RFMO] in accordance with the rules and procedures of that organisation and in conformity with international law’.
15. The UK-Australia free trade agreement (signed 2021; entered into force 2023) replicates these prohibitions and other CP-TPP provisions relating to marine capture fisheries.
16. The revised trade agreement between Canada, Mexico and the United States (signed 2018; entered into force 2020) reproduces and expands these disciplines. In addition, the EU Regulation on IUU Fishing (2008) provides that ‘Member States shall not grant any public aid under domestic aid regimes or under Community funds to operators involved in the operation, management or ownership of fishing vessels included in the Community IUU vessel list’.

**Submission 3:** *The Agreement is consistent with regional reform efforts, including in agreements ratified by Australia.*

## Conclusion

In support of Australia’s ratification of the Agreement, this submission has noted the following:

- The prohibition on subsidies for illegal, unreported or unregulated (‘IUU’) fishing or fishing of overfished stocks will improve sustainability (para 6-9; Submission 1);
- The reform to rules relating to fisheries subsidies has received strong support from civil society (para 10-12; Submission 2); and
- The Agreement is consistent with regional reform efforts, including in agreements already ratified by Australia (para 13-16; Submission 3).

<sup>5</sup> See International Institute for Sustainable Development, et al, “Stop Funding Overfishing”, available at <https://stopfundingoverfishing.com/> (November 2020).

<sup>6</sup> For relevant provisions, see Margaret A. Young, ‘Protection of the Marine Environment: Rights and Obligations in Trade Agreements’ (2021) 9 *Korean Journal of International and Comparative Law* 196, 206.