

Casting the net wider? The transformative potential of integrating human rights into the implementation of the WTO Agreement on Fisheries Subsidies

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Abstract

The removal of harmful fisheries subsidies is essential to reverse unsustainable fisheries globally. This goal has now, in part, been met following the World Trade Organization Ministerial Conference in June 2022, which adopted an Agreement on Fisheries Subsidies. There is a vast literature on the trade law issues associated with fisheries subsidies, and much has been written on their detrimental environmental impacts. In this article, we take a different approach. We contextualize the elimination of harmful fisheries subsidies as part of the transformative change needed to reverse biodiversity loss, with the integration of human rights an essential precondition to such transformational processes. We develop a mutually supportive interpretation of international environmental law, international trade law and international human rights law, drawing on insights from regime interaction scholarship, to argue for reliance on human rights in the implementation of the historic agreement on the elimination of certain forms of harmful fisheries subsidies.

1 | INTRODUCTION

Subsidies are commonplace within the fisheries sector, where they often contribute to overcapacity and overfishing of certain stocks.¹ Over 34% of stocks are fished at biologically unsustainable levels,² and harmful fisheries subsidies that contribute to overcapacity and overfishing are estimated to equate to around one third of the value of production of global fisheries with a consequent knock-on impact on current fish stocks.³ Certain forms of fisheries subsidies may also

support illegal, unreported and unregulated (IUU) fishing, putting pressure on already fragile ecosystems, as well as potentially undermining regional stability and threatening food security.⁴ IUU fishing has also been linked to transnational organized crime and labour abuses,⁵ 'violat[ing] human rights, jeopardiz[ing] food security, and depriv[ing] governments of revenues'.⁶ Although few, if any, governments would willingly subsidize IUU fishing, the problem arises when operators,

¹United Nations Conference on Trade and Development (UNCTAD), 'Trade and Environment Review 2016: Fish Trade' (UNCTAS 2016). That said, not all subsidies granted to the fisheries sector are 'bad'. Certain forms of subsidy may have beneficial effects, such as those promoting responsible fisheries management and conservation. See I Porras, 'Fair Fishing: Supporting Inclusive Fiscal Reform in Fisheries' (International Institute for Environment and Development 2020); and UR Sumaila et al., 'Updated Estimates and Analysis of Global Fisheries Subsidies' (2019) 109 *Marine Policy* 103695.

²Food and Agriculture Organization of the United Nations (FAO), 'The State of World Fisheries and Aquaculture 2020: Sustainability in Action' (FAO 2020) 7.

³A Tipping and T Irschlinger, 'WTO Negotiations on Fisheries Subsidies: What's the State of Play?' (International Institute for Sustainable Development (IISD) 2020).

⁴B Soyer, G Leloudas and D Miller, 'Tackling IUU Fishing: Developing a Holistic Legal Response' (2018) 7 *Transnational Environmental Law* 139. See also A Tipping and T Irschlinger, 'WTO Negotiations on Fisheries Subsidies Update: What is the State of Play?' (IISD 2021).

⁵United States Trade Representative (USTR), 'United States Urges WTO Members to Address Forced Labor on Fishing Vessels in Ongoing Fisheries Subsidies Negotiations' (26 May 2021) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-urges-wto-members-address-forced-labor-fishing-vessels-ongoing-fisheries-subsidies>>.

⁶ER Selig et al., 'Revealing Global Risks of Labor Abuse and Illegal, Unreported, and Unregulated Fishing' (2022) 13 *Nature Communications* 1612.

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vessels or fisherfolk receive government assistance for a legitimate purpose but nevertheless go on to engage in IUU fishing.⁷

Harmful fisheries subsidies should be understood not only in the context of the global efforts to ensure sustainable fisheries but also in the broader context of the global biodiversity crisis,⁸ whereby the rate of global biodiversity degradation during the past 50 years is unprecedented in human history. Sixty-six percent of the ocean is experiencing increasing cumulative impacts, due to pollution, climate change and overfishing.⁹ Global biodiversity loss has undermined progress towards 80% (35 out of 44) of targets assessed within the Sustainable Development Goals (SDGs) related to poverty, hunger, health, water, cities, climate, oceans and land.¹⁰ The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES)¹¹ has advocated the need for 'transformative change' to stop global biodiversity loss. The Platform's Global Assessment report underscored the need for transformative processes to address biodiversity loss by addressing inequalities, especially regarding income and gender. Such inequalities undermine the capacity for sustainability; inclusive decision-making, as well as the fair and equitable sharing of benefits arising from the use of biodiversity and its conservation; and the recognition and respectful inclusion of the knowledge and innovations of Indigenous peoples and local communities in environmental governance.¹²

To support the kind of 'transformative change' needed to prevent further biodiversity loss, a holistic and integrated approach to the regulation of harmful fisheries subsidies is needed. Fisheries subsidies occupy an already congested legal space in terms, inter alia, of international trade law, international environmental law—including international biodiversity law—and international law on sustainable fisheries.¹³ The very existence of these overlapping and fragmented legal regimes requires careful and ongoing 'regime interplay management'¹⁴ to ensure the mutual supportiveness of relevant instruments¹⁵ through good faith efforts to interpret, negotiate and

conclude instruments clarifying relationships between related regimes.¹⁶

The World Trade Organization (WTO) is the central forum for the management of fisheries subsidies, as stipulated in SDG 14.6.¹⁷ In June 2022, its membership promulgated an Agreement on Fisheries Subsidies (AFS), which met some of the goals of SDG 14.6, whereas certain aspects of its fisheries subsidy mandate are still under negotiation. There are, however, long-standing concerns that the WTO lacks epistemic capacity to address environmental and equity concerns around fisheries subsidies.¹⁸ Concerns also exist regarding the rather limited public participation in its negotiating procedures compared with multilateral environmental processes.¹⁹ Specific international standards for public participation have already been identified at the intersection of international environmental law and international human rights,²⁰ which are relevant for WTO members that are parties to international human rights treaties.

Although there is a vast literature on fisheries subsidies, with much written on their detrimental environmental impacts,²¹ a human rights lens has been less common²² and definitely not a dominant frame within the literature.²³ More specifically, the potential within the fisheries subsidies debate for international human rights law to act as an entry point to effect the 'transformative change' needed to avert biodiversity loss, as well as to enhance expertise and participation in the WTO, has not, as yet, received attention.

It has been argued elsewhere that human rights can contribute to transformative change²⁴—a shift from 'the technocratic and regulatory fix of environmental problems to more fundamental and

⁷On this point, see J Lee, 'Subsidies for Illegal Activities? Reframing IUU Fishing from the Law Enforcement Perspective' (2019) 22 *Journal of International Economic Law* 417.

⁸S Diaz et al (eds), *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES Secretariat 2019).

⁹Ibid 11.

¹⁰Ibid 15.

¹¹Transformation is 'a fundamental, system-wide change that includes consideration of technological, economic and social factors, including in terms of paradigms, goals or values'. By extension, '(o)bstacles to achieving transformative change, including unequal power relations, lack of transparency, vested interests, unequal distribution of the costs and benefits of actions, tendencies for short-term decision-making, the psychology of losses and gains, the logic of market-driven processes, the lack of policy coherence and inertia'. See IPBES, 'Initial Scoping Report for Deliverable 1 (c): A Thematic Assessment of the Underlying Causes of Biodiversity Loss and the Determinants of Transformative Change and Options for Achieving the 2050 Vision for Biodiversity' (2021) <https://ipbes.net/sites/default/files/Initial_scoping_transformative_change_assessment_EN.pdf>.

¹²Diaz et al (n 8) 17.

¹³See generally MA Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press 2011).

¹⁴There is a vast literature on regime interplay; see, e.g., OS Stokke, 'Interplay Management' in F Biermann and RE Kim (eds), *Architectures of Earth System Governance: Institutional Complexity and Structural Transformation* (Cambridge University Press 2020) 207.

¹⁵See discussion in E Morgera, S Switzer and E Tsioumani, 'Study into Criteria to Identify a Specialized International Access and Benefit-sharing Instrument, and a Possible Process for Its Recognition' UN Doc CBD/SBI/2/INF/17 (29 May 2018). See in general terms Young (n 13).

¹⁶R Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) 21 *European Journal of International Law* 649, 650–669.

¹⁷SDG 14.6 states: '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.' UNGA 'Transforming Our World: The 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1 (21 October 2015) Goal 14.6.

¹⁸Young (n 13) 86.

¹⁹Ibid 131, noting that '[i]nter-regime learning has been further hampered by the decision to insulate the Rules Group from external participants or observers, due to the oft-cited wish of WTO Members to remain a "Member driven organisation"'. Young notes that this gap has been filled by the activities of intergovernmental organizations such as the FAO and the United Nations Environment Programme, which have provided opportunities for inter-regime learning. However, these opportunities do not guarantee public participation, as seen in institutions such as the Convention on Biological Diversity.

²⁰E Morgera and H Lily, 'Public Participation at the International Seabed Authority: An International Human Rights Law Analysis' (2022) 31 *Review of European, Comparative and International Environmental Law*.

²¹By way of illustration, a search via on Scopus produced 873 document results for the search term 'fisheries subsidies' AND 'sustainability' OR 'environmental'. The same search via HeinOnline produced 673 results.

²²AT Charles, 'Small-scale Fisheries: On Rights, Trade and Subsidies' (2011) 10 *Maritime Studies* 85; KA Reinert, 'Fisheries Subsidies and the World Trade Organization: A Concise History' (2022) *International Negotiation* <<https://doi.org/10.1163/15718069-bja10057>>; and Danish Institute for Human Rights, 'The Human Rights Impacts of Fisheries Subsidies: Analysis, Implications and Recommendations (Working Draft)' (2022) <<https://www.humanrights.dk/publications/human-rights-impacts-fisheries-subsidies>>.

²³A full-text search of Scopus using the search term 'fisheries subsidies' AND 'human rights' produced 90 document results.

²⁴B Erinosho et al, 'Transformative Governance for Ocean Biodiversity' in JJ Visseren-Hamakers and MTJ Kok (eds), *Transforming Biodiversity Governance* (Cambridge University Press 2022) 313.

transformative changes in social-political processes and economic relations'.²⁵ We aim to demonstrate pathways for the mutual supportiveness of obligations under international human rights law in respect of ongoing fisheries subsidies negotiations as well as the implementation of current disciplines on fisheries subsidies.

In addition to securing policy coherence, we build on regime interaction scholarship to show the need and opportunities for inter-institutional learning between the WTO and other international processes that can contribute to addressing the biodiversity and socio-cultural dimensions of fisheries subsidies. We build on Young's argument that interactions between regimes may be best 'addressed by moving away from conceptions of strict legal mandates and legal hierarchies, and embracing deliberation and ongoing inter-regime scrutiny by a range of participants'.²⁶ She identifies 'inter-regime learning and coordination' as key factors to the success of different regimes being able to effectively address the problem of the overexploitation of fisheries.²⁷ The original contribution of this article is then to extend the regime interaction focus on fisheries subsidies, which has so far mainly focused on the interactions between international trade law and international environmental law as well as international fisheries law, to encompass international human rights law.

We develop our argument by first illustrating the negative human rights impacts of harmful fisheries subsidies and potential negative impacts of subsidy removal (Section 2). We explore WTO members' existing obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁸ taking the examples of the right to adequate food and the right to take part in cultural life for small-scale fishers, fishworkers and their communities. Although we do not comprehensively map negative or positive human rights impacts of subsidies or the elimination of subsidies in the small-scale fisheries (SSF) sector, we highlight pertinent treaty obligations of the majority of WTO members. We place these human rights implications related to subsidies within the broader context of rights-based fisheries governance. We then provide an overview of the recently concluded AFS, commenting on the human rights implications of the agreed provisions as well as of the missing elements in the Agreement (Section 3). In the following section, we point to the need to consider the human rights implications of reinvesting the funds that will become available from the elimination of fisheries subsidies (Section 4). Finally, we draw on regime interaction literature to ensure policy coherence in the implementation of the AFS and the process of subsidy removal and redistribution from a human rights perspective (Section 5). We focus particularly on the opportunities for mutual learning, with a view to preventing any negative impacts on the most vulnerable and thereby supporting the transformative change needed to address biodiversity loss.

2 | RECOGNIZING HUMAN RIGHTS IMPLICATIONS OF FISHERIES SUBSIDIES AND THEIR ELIMINATION

In this section, we connect fisheries subsidies to key human rights standards and duties found in the ICESCR, a core international human rights treaty which the vast majority of WTO members have ratified. This provides specific examples of why the development and implementation of rules on fisheries subsidies demands engagement by WTO members with international human rights law. We then contextualize these interconnections within a broader context of 'norms-based'²⁹ approaches—in advocacy, scholarship and international practice—promoting sustainable, social justice-focused fisheries governance. This highlights broader, existing foundations for interaction between regimes.

2.1 | Core treaty obligations: Examples of the right to adequate food and the right to take part in cultural life

Although subsidies might impact human rights positively in some senses, they may have negative human rights impacts in other ways.³⁰ Negative impacts have been raised notably via United Nations (UN) special procedures mechanisms. For example, the former UN Special Rapporteur on human rights and the environment, John H. Knox, recognized impacts of fisheries subsidies on everyone's right to a healthy environment: the threat posed to marine ecosystems' health via the grant of distorting subsidies³¹ in the fisheries sector³² undermines the enjoyment of all human rights (life, health and culture) that are dependent on healthy marine ecosystems and underpinning biodiversity, in as far as the impact of fisheries subsidies contributes to unsustainable fishing practices and negative impacts on marine ecosystems.³³

Although States may not yet all have the same understanding of the legal nature and content of the international human right to a healthy environment, despite its recognition by the UN General Assembly in 2022,³⁴ widely ratified international human rights treaties are relevant in the context of fisheries subsidies rules and

²⁵IJ Visseren-Hamakers and MTJ Kok, 'Introduction' in Visseren-Hamakers and Kok (n 24) 3.

²⁶MA Young, 'Fragmentation or Interaction: The WTO, Fisheries Subsidies, International Law' (2009) 8 *World Trade Review* 477, 479.

²⁷Young (n 13) 243.

²⁸International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

²⁹BD Ratner, B Åsgård and EH Allison, 'Fishing for Justice: Human Rights, Development, and Fisheries Sector Reform' (2014) 27 *Global Environmental Change* 120, 120; BP Galligan, 'Fisheries Extractivism and the Right to Subsistence: Conflicting Governance Models and the Legal Structures that Enact Them' (2021) 133 *Marine Policy* 104729.

³⁰The Danish Institute for Human Rights has proposed a typology of human rights impacts that mirrors conventional approaches to conceptualizing sustainability impacts: beneficial, ambiguous and harmful; Danish Institute for Human Rights (n 22) 12–13 and 20.

³¹For a useful summary of the impacts on ecosystem health, see JJ Heymans et al, 'The Impact of Subsidies on the Ecological Sustainability and Future Profits from North Sea Fisheries' (2011) 6 *PLoS One*.

³²J Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' UN Doc A/HRC/34/49 (19 January 2017) para 5.

³³Heymans et al (n 31).

³⁴UNGA 'The Human Right to a Clean, Healthy and Sustainable Environment' UN Doc A/RES/76/300 (1 August 2022), which was preceded by Human Rights Council (HRC) 'The Human Right to a Clean, Healthy and Sustainable Environment' UN Doc A/HRC/RES/48/13 (18 October 2021).

implementation. This is the case, for instance, of the ICESCR, which has been ratified by 149 WTO members³⁵; that is, the vast majority of (State) members have legally binding duties under this treaty. Specifically, a connection has long been recognized between fisheries subsidies and the right to adequate food (as part of the human right to an adequate standard of living) under Article 11 of the ICESCR:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent³⁶

State duties include mitigating hunger³⁷ and taking steps towards full realization, including through international cooperation (including economic and technical).³⁸ The right to food requires 'physical and economic access at all times to adequate food or means for its procurement' for individuals and individuals in community with others.³⁹

The right to food (as well as the broader right to an adequate standard of living) can be undermined by subsidies that sustain IUU fishing, as well those that sustain overcapacity. Such subsidies can produce detrimental effects on the access of artisanal and subsistence fishers to marine resources.⁴⁰ Of note is that the majority of fisheries subsidies are granted to large-scale fishers, to the detriment of small-scale fishers.⁴¹ As far back as 2004, the then-UN Special Rapporteur on the Right to Food, Jean Ziegler, observed that State policies that undermine this right—including for small-scale fishers and their communities⁴² through the grant of distorting subsidies—'would amount to a regression in the realization of the right to adequate food. States' obligation to progressively realize the right to food means that people's standard of living and level of food security should consistently improve, not deteriorate'.⁴³ The subsequent Special Rapporteur on the Right to Food, Olivier De Schutter, posited that, 'due to unsustainable and destructive fishing practices and distorting subsidies, the

productivity of global fisheries as a source of food is declining',⁴⁴ thereby presenting a direct threat to the right to food.⁴⁵ At a basic level, therefore, WTO members should be aware that the removal of harmful fisheries subsidies targeted at large-scale fisheries may have potential to positively impact the realization of the right to adequate food.

The relationship between large- and small-scale fisheries can, however, be complicated, and therefore, the impacts of subsidies and the removal of subsidies can have different impacts on human rights. There are documented interactions between small- and large-scale fisheries, with some small-scale fishers involved in large-scale fisheries.⁴⁶ For instance, in Ghana, large-scale fishers catch fish stocks that are reserved for artisanal fishers and trans-ship them to SSF canoes for re-sale, thereby involving small-scale fishers in illegal fishing operations.⁴⁷ Thus, the phasing out of subsidies relating to large-scale fisheries, including to IUU fishing, might have negative impacts on small-scale fishers' access to food and livelihoods. This is because they are less able to catch these fish stocks themselves due to the competition with large-scale fishers and may have become dependent on or otherwise 'locked in' to illegal activities due to the difficulty of protecting their rights to food and livelihoods.

In addition, there may be cases in which environmentally harmful fisheries subsidies targeting SSF have a positive impact on their human rights, meaning that their removal could have negative human rights impacts as a result. Although the removal is necessary for conservation reasons (and broader benefits to everyone's human right to a healthy environment and the right to food), balanced consideration is still needed of the impacts on small-scale fishers' human rights. For instance, in Ghana, SSFs receive, in principle, US\$40 million in subsidies on nets, outboard motors and fuel, thereby supporting the protection of their right to food. But a racketeers' middle market for fuel has emerged that resells low-cost subsidized fuel to SSF at high prices, thereby negatively impacting on SSF's economic rights and leading to small-scale fishers engaging in illegal fishing.⁴⁸

There is also another connection between the potential impact of subsidy removal and human rights, which has been under-acknowledged, and that is the connection with the right to take part in cultural life. Article 15 ICESCR provides that:

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation and the diffusion of science and culture.⁴⁹

³⁵State members that have signed but not ratified the ICESCR rights are Cuba and the United States; and 12 members who have neither signed nor ratified are Botswana, Brunei Darussalam, Malaysia, Mozambique, Saint Kitts and Nevis, Saint Lucia, Samoa, Saudi Arabia, Singapore, Tonga, United Arab Emirates and Vanuatu. See WTO, 'Members and Observers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>; Office of the High Commissioner of Human Rights, 'Status of Ratification Interactive Dashboard' <<https://indicators.ohchr.org/>>.

³⁶ICESCR (n 28) art 11(1).

³⁷ICESCR 'General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)' UN Doc E/C.12/1999/5 (12 May 1999) para 6.

³⁸This aligns with the Covenant's general obligation of progressive realization 'individually and through international assistance and co-operation, especially economic and technical'. ICESCR (n 28) art 2(1).

³⁹ICESCR (n 7) para 6.

⁴⁰UNGA (n 17) Goal 14b.

⁴¹A Schuhbauer et al, 'How Subsidies Affect the Economic Viability of Small-scale Fisheries' (2017) 82 Marine Policy 114. See also A Schuhbauer et al, 'The Global Fisheries Subsidies Divide Between Small- and Large-Scale Fisheries' (2020) 7 Frontiers in Marine Science 1.

⁴²UNGA 'The Right to Food' UN Doc A/59/385 (27 September 2004) para 44.

⁴³ibid paras 43, 57.

⁴⁴O De Schutter, 'Report of the Special Rapporteur on the Right to Food: The Transformative Potential of the Right to Food' UN Doc A/HRC/25/57 (24 January 2014) para 8. See also Danish Institute for Human Rights (n 22) 21.

⁴⁵See also ibid; and UNGA 'Interim Report of the Special Rapporteur on the Right to Food' UN Doc A/67/268 (8 August 2012).

⁴⁶DS Johnson, 'Category, Narrative, and Value in the Governance of Small-scale Fisheries' (2006) 30 Marine Policy 747, 749.

⁴⁷Danish Institute for Human Rights (n 22) 19.

⁴⁸ibid.

⁴⁹ICESCR (n 28) art 15(2).

'Culture' has been described by the CESCR as 'encompassing' multiple dimensions that may be relevant for small-scale fishers, fishworkers and their communities, including 'ways of life', 'rites and ceremonies', 'methods of production', 'natural and man-made environments', 'food' and 'customs and traditions'.⁵⁰ ICESCR States parties have a duty to ensure that changes to subsidy provision, which may lead to restrictions upon the access of small-scale fishers to marine resources, are examined for potential negative impacts on the right to take part in cultural life.

In Ghana, for example, fisheries subsidies may affect the catch of sardinella, which is culturally significant for small-scale fishers, thereby having impacts on both the right to food and right to culture.⁵¹ In addition, small-scale fishers' canoes are expressions of their cultural heritage and customary laws, including communities' sustainable fisheries knowledge and management practices, as these are embodied in inscriptions and paintwork on the canoes.⁵² Capacity-related subsidies that support the use of canoes, therefore, contribute to the protection of cultural rights, whereas potential removal of these subsidies could negatively impact on these cultural dimensions, with potential knock-on effects on culture-related supplementary or alternative livelihoods for small-scale fishers.

In addition to the fact that the provision of fisheries subsidies may have multiple human rights impacts, the removal of certain fisheries subsidies may have negative human rights impacts—likely engaging multiple, interconnected human rights.⁵³

2.2 | Subsidies within the broader context of fisheries governance and human rights

A range of instruments and actors have come to recognize considerable linkages between international human rights and the SSF sector, increasingly with explicit human rights-based framings. Although the UN Convention on the Law of the Sea does not refer to human rights, it does observe the 'economic needs of coastal fishing communities'⁵⁴ and the need to avoid discrimination resulting from high seas conservation measures.⁵⁵ International instruments in the 1990s continued in this direction, by further recognizing a connection to livelihoods and by highlighting small-scale fishers' rights of access to marine spaces and resources. The UN Fish Stocks Agreement establishes an obligation to take into account the need to avoid adverse impacts on small-scale fishers and to ensure access to fisheries by small-scale fishers and women fishworkers, as well as Indigenous peoples, in developing States in giving effect to States' duty to cooperate in the establishment of

conservation and management measures.⁵⁶ The 1995 Code of Conduct for Responsible Fisheries⁵⁷ refers to 'rights' of small-scale fishers 'to a secure and just livelihood', preferential access to traditional fishing grounds,⁵⁸ and inclusion in decision-making processes and 'other activities related to coastal area management planning and development'.⁵⁹ The Code of Conduct thereby recognizes entitlements related to livelihoods, access in support of traditional practices, and participation in planning processes and decision-making.

A more explicit connection between SSF and international human rights law was driven by community-based struggles and civil society advocacy.⁶⁰ This connection was furthered in scholarship by civil society actors in the fisheries governance sector. Allison and others, writing a decade ago with a focus on SSF, made the case for a human rights-based approach to fisheries governance, to align with the explicit approach invoked in the international development sector. These authors, from a range of organizations including the WorldFish Center, identified a foundational connection between human rights protection towards the reduction of poverty and vulnerability, and the conditions in which fishing communities would be able to effectively engage with fisheries management processes.⁶¹ This work was developed on the basis of civil society deliberation and interaction with the UN Food and Agriculture Organization (FAO) over several preceding years,⁶² which culminated in the adoption of the 2015 FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (SSF Guidelines).⁶³ The Guidelines represent a key juncture in a human rights 'turn' in the transnational fisheries governance discourse.⁶⁴

The SSF Guidelines seek to combine the ecosystem approach to fisheries with a human rights-based approach,⁶⁵ providing more sector-specific interpretative guidance for the general, binding obligations on the right to food under the ICESCR, among other binding international human rights treaties. The Guidelines require States to, 'where appropriate', grant preferential access to SSF, particularly vulnerable groups, through the creation and enforcement of exclusive zones for SSF in areas within national jurisdiction.⁶⁶ They also call for equal participation of women in SSF-relevant decision-making processes,⁶⁷ and training and support for small-scale fishing

⁵⁶Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 December 1995, entered into force on 11 December 2001) 2167 UNTS 3 art 24(2)(b).

⁵⁷Code of Conduct for Responsible Fisheries (adopted 31 October 1995) <<https://www.fao.org/3/v9878e/v9878e00.htm>>.

⁵⁸ibid art 6.18.

⁵⁹ibid art 10.1.2.

⁶⁰EH Allison et al, 'Rights-based Fisheries Governance: From Fishing Rights to Human Rights' (2012) 13 Fish and Fisheries 14, 20; Ratner et al (n 29) 126–127; R Willmann et al, 'A Human Rights-Based Approach in Small-Scale Fisheries: Evolution and Challenges in Implementation' in S Jentoft et al (eds), *The Small-Scale Fisheries Guidelines* (Springer 2017) 763, 767–769.

⁶¹Allison et al (n 60).

⁶²ibid 25–26.

⁶³FAO, 'Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication' (FAO 2015) (SSF Guidelines).

⁶⁴Ratner et al (n 29) 121.

⁶⁵SSF Guidelines (n 63) para 1.1.

⁶⁶ibid para 5.7.

⁶⁷ibid subsection 8.2.

⁵⁰CESCR 'General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/GC/21 (21 December 2009) paras 10–13.

⁵¹Danish Institute for Human Rights (n 22) 19.

⁵²One Ocean Hub event for World Ocean Week 2021, 'Canoe Culture and Heritage in Ghana' <<https://www.youtube.com/watch?v=tdWFQ9Znank>>.

⁵³Danish Institute for Human Rights (n 22) 20.

⁵⁴United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art 61(3). See also ibid arts 69–70.

⁵⁵ibid art 119(3).

communities to participate and take responsibility for the management of the resources they depend upon for their well-being and livelihoods.⁶⁸ The Guidelines further recommend ensuring active, free, effective, meaningful and informed participation of small-scale fishing communities, including Indigenous peoples⁶⁹ in the negotiation of agreements.⁷⁰ Other FAO instruments also progressed the framing of fisheries governance in human rights terms. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)⁷¹ call on States to secure small-scale fishers' land and natural resource tenure as this is expressly connected to the realization of their civil, cultural, economic, political and social human rights.⁷² Both the SSF Guidelines and the VGGT refer to the relevance of the UN Declaration on the Rights of Indigenous Peoples⁷³ as part of their guidance on the interpretation of various sources of international human rights law in the fisheries sector.⁷⁴

UN Special Rapporteurs have also clarified the interpretation of relevant international human rights treaties in connection with fisheries,⁷⁵ culminating—together with other global social movements⁷⁶—in the UN Declaration on the Rights of Peasants (UNDROP), which applies specifically to small-scale fishers.⁷⁷ States' specific duties vis-à-vis peasants in SSF concern non-discrimination, access to effective remedies and the protection of human rights defenders.⁷⁸ States' duties also include an express obligation to give priority to small-scale fishers in the allocation of fisheries,⁷⁹ linking the attainment of an adequate standard of living to control of fishing grounds.⁸⁰ The Declaration underscores the link between the duty to conserve and sustainably use biodiversity and the need 'to promote and protect the full enjoyment of the rights of peasants'.⁸¹

In summary, the growing understanding of the relevance of international human rights instruments and approaches in the SSF context has moved from a concern with forms of property rights⁸² to a much

wider concern with pre-existing and specific articulations of substantive and procedural human rights relevant to small-scale fishers' distinctive way of life. The human rights lens is by now also reflected in a substantial body of academic literature.⁸³ This literature (alongside a body of grey literature in the field) has connected fisheries to a range of substantive rights (including to decent work, adequate housing, healthy environment, freedom of expression and access to information, freedom of assembly and association) and special rights protections for particular groups (including women and Indigenous peoples).⁸⁴ All of this evidences a growing understanding of the relevance of international human rights law to the fisheries governance context, of which subsidies are one key element.

3 | REFRAMING FISHERIES SUBSIDIES AT THE WTO

In this section, we provide an overview of the recently concluded WTO AFS, commenting on the human rights implications of the substantive provisions of the Agreement, as well as on the implications of missing elements.

3.1 | Background to the WTO fisheries subsidies negotiations

The WTO AFS applies to subsidies in the fisheries sector.⁸⁵ However, government subsidies are also regulated by the WTO Agreement on Subsidies and Countervailing Measures (ASCM).⁸⁶ A subsidy, according to this agreement, is a financial contribution by a government or any public body within the territory of a WTO member that confers a 'benefit' and is 'specific' in the sense of applying to a specific industry, producers in a particular region or a specific enterprise.⁸⁷ Certain forms of subsidy, such as those contingent upon export performance and those linked to the use of domestic over imported goods, are automatically prohibited under WTO law.⁸⁸

In the fisheries sector, certain subsidies, such as fuel subsidies and subsidies to facilitate the construction of fishing vessels,

⁶⁸ibid para 5.15.

⁶⁹ibid para 3.1(6), principle 6. For a critique of this expression as opposed to free, prior and informed consent, see E Morgera and J Nakamura, 'Shedding a Light on the Human Rights of Small-Scale Fishers: Complementarities and Contrasts between the UNDROP and the Small-Scale Fisheries Guidelines' in M Alabrese et al (eds), *The United Nations' Declaration on Peasants' Rights* (Routledge 2022) 62, 70–71.

⁷⁰SSF Guidelines (n 63) subsection 5.1.

⁷¹FAO and Committee on World Food Security, 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (2022) (VGGT) para 1.1; see also FAO, 'The Right to Food and the Responsible Governance of Tenure: A Dialogue towards Implementation' (FAO 2014), connecting these guidelines specifically to the right to food in international human rights law.

⁷²VGGT (n 71) section 4. See also SSF Guidelines (n 63) para 5.3.

⁷³UNGA 'Declaration on the Rights of Indigenous Peoples' UN Doc A/RES/61/295 (2 October 2007); SSF Guidelines (n 63) para 3.6; and VGGT (n 71) para 9.3.

⁷⁴Morgera and Nakamura (n 69) 71.

⁷⁵De Schutter (n 44).

⁷⁶L Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up' (2020) 48 *Georgia Journal of International and Comparative Law* 473, 505–508.

⁷⁷HRC 'United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas' UN Doc A/HRC/RES/39/12 (8 October 2018) (UNDROP); see Morgera and Nakamura (n 69) 65–66.

⁷⁸UNDROP (n 77) art 17(6).

⁷⁹ibid; see also art 5.

⁸⁰Cotula (n 76) 508–513.

⁸¹UNDROP (n 78) art 20(1). See Morgera and Nakamura (n 69) 69.

⁸²Allison et al (n 60) 14.

⁸³K Ruddle and A Davis, 'Human Rights and Neo-liberalism in Small-scale Fisheries: Conjoined Priorities and Processes' (2013) 39 *Marine Policy* 87; AM Song, 'Human Dignity: a Fundamental Guiding Value for a Human Rights Approach to Fisheries?' (2015) 61 *Marine Policy* 164; AM Song and A Soliman, 'Situating Human Rights in the Context of Fishing Rights: Contributions and Contradictions' (2019) 103 *Marine Policy* 19.

⁸⁴Willmann et al (n 60); S Gry Fridal Hansen, B Feiring and S Stidsen, 'Enhancing Accountability for Small-Scale Fishers - Using Human Rights Monitoring to Guide Effective Implementation of SDG Target 14.B' (Danish Institute for Human Rights 2021).

⁸⁵WTO, 'GATT/WTO Rules on Subsidies and Aids Granted in the Fishing Industry', WT/CTE/W/80 (9 March 1998).

⁸⁶Agricultural subsidies are regulated by the WTO Agreement on Agriculture (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 410, but fish do not fall within this Agreement; see Annex 1, which provides that the Agreement's coverage includes 'HS Chapters 1 to 24 less fish and fish product'.

⁸⁷Agreement on Subsidies and Countervailing Measures (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 14 (ASCM) arts 1–2.

⁸⁸ibid art 3.

potentially fit within the definition of a subsidy set out in the ASCM.⁸⁹ However, in broad terms, the ASCM has proven ineffective at disciplining subsidies in the fisheries sector.⁹⁰ In part, this may be explained by the focus of the ASCM, which is on the adverse trade effects of a subsidy.⁹¹ In essence, the ASCM does not ‘adequately address other negative trade, environment and development impacts of fisheries subsidies, particularly the distinctive production distortions [that] subsidies can cause in the fisheries sector’.⁹² Accordingly, the negotiations on fisheries subsidies launched in 2001 aimed to ‘clarify and improve existing disciplines’,⁹³ while also recognizing the need to ensure ‘the mutual supportiveness of trade and environment’. In 2005, it was clarified that the WTO negotiations should include the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing,⁹⁴ ‘taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns’.⁹⁵ The next section explores the key features of the agreement reached in 2022.

3.2 | The WTO AFS

The AFS applies to ‘marine wild capture fishing and fishing-related activities at sea’.⁹⁶ Subsidies for aquaculture and inland fisheries are hence excluded from its scope.⁹⁷ A subsidy is defined as a financial contribution by the government or a public body with the financial

contribution in question required to confer a benefit.⁹⁸ The subsidy in question must be ‘specific’; in essence, this requires that it is targeted towards certain enterprises, industries or geographical areas.⁹⁹ Accordingly, only fisheries subsidies that involve a financial contribution, confer a benefit and are also specific fall within the scope of the AFS.¹⁰⁰

In terms of substantive obligations, the AFS has two central pillars, providing disciplines in respect of subsidies granted for IUU fishing and overfished stocks. In relation to the IUU pillar, subsidies to vessels or operators engaged in IUU fishing or fishing-related activities in support of IUU fishing are essentially prohibited.¹⁰¹ The definition for IUU fishing adopted in the AFS is the same as that provided by the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.¹⁰² Pursuant to the AFS, an IUU determination may be made by a coastal State with regard to activities under its jurisdiction, by a flag State member for vessels flying its flag, as well as by a Regional Fisheries Management Organization or Arrangement (RFMO/A). Due process rules exist in relation to the making of any such determination of IUU fishing. At the same time, the subsidizing 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 in Article 3.1’.¹⁰³ For port State members, where such a member ‘notifies a subsidizing member that it has clear grounds to believe that a vessel in one of its ports has engaged in IUU fishing, the subsidizing member shall give due regard to the information received and take such actions in respect of its subsidies as it deems appropriate’.¹⁰⁴

The core obligation of the second pillar is that ‘no Member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock’.¹⁰⁵ For the purposes of the AFS, the decision on whether a fish stock is overfished falls within the competence of 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’.¹⁰⁶ Notably, and sensibly, subsidies applicable to overfished stocks, which are granted for the purposes of allowing recovery of the relevant stock to biologically sustainable levels, are excluded from the scope of the AFS.¹⁰⁷

Under the umbrella term ‘other subsidies’, the AFS provides that ‘[n]o Member shall grant or maintain subsidies provided to fishing or

⁸⁹F Asche and MD Smith, ‘Trade and Fisheries: Key Issues for the World Trade Organization’ (WTO 2010) <https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_asche_smith_e.htm>.

⁹⁰For a concise overview of negotiations up until 2022, as well as some of the problematic features of the ASCM as applied to fisheries subsidies, see Reinert (n 22).

⁹¹The ASCM provides disciplines in respect of prohibited subsidies—i.e. those containing domestic content requirements or contingent upon export—as well as so-called ‘actionable subsidies’. Among other things, for a member to seek dispute settlement proceedings at the WTO in respect of an actionable subsidy, they must, pursuant to Article 5 of the ASCM, demonstrate ‘adverse effects’ on trade. On a related note, similar problems confront the capacity of the ASCM to discipline fossil fuel subsidies. According to van Asselt and Moerenhout, ‘[o]verall, the ASCM offers some potential to challenge fossil fuel subsidies, particularly production subsidies, but any such challenge faces strategic, political, and legal-evidentiary hurdles. If WTO subsidy rules are to play a role in supporting the transition to cleaner energy systems, however, the main limitation of the ASCM is that it focuses solely on (some of) the trade-distorting effects of subsidies. It does not take into account the social and environmental externalities of fossil fuel subsidies, including the effects on climate change’. H van Asselt and T Moerenhout, ‘Fit for Purpose? Toward Trade Rules that Support Fossil Fuel Subsidy Reform and the Clean Energy Transition’ (Nordic Council of Ministers 2020) 5–6.

⁹²WTO, Negotiating Group on Rules, ‘The Doha Mandate To Address Fisheries Subsidies: Issues – Submission From Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines And The United States’, TN/RL/W/3 (24 April 2002). In respect of the ‘other negative trade impacts’ of fisheries subsidies, this submission identified the ‘distinctive production distortions subsidies can cause in the fisheries sector. In addition, the heterogeneous nature of fisheries products, and the diffuse nature of support to the sector, make it harder to demonstrate the existence of market distortions of the kind envisaged by existing SCM disciplines’ (ibid 1).

⁹³WTO, ‘Ministerial Declaration of 14 November 2001’, WT/MIN(01)/DEC/1 (20 November 2001) para 28.

⁹⁴WTO, ‘Hong Kong Ministerial Declaration’, WT/MIN(05)/DEC (22 December 2005) Annex D, para 9.

⁹⁵ibid.

⁹⁶WTO, ‘Agreement on Fisheries Subsidies’, WT/MIN(22)/33, WT/L/1144 (22 June 2022) (AFS) art 1.

⁹⁷ibid footnote 1.

⁹⁸The AFS cross-references the ASCM with regard to its scope; the AFS ‘applies to subsidies, within the meaning of Article 1.1 of the [ASCM] that are specific within the meaning of Article 2 of that Agreement’; ibid art 1. Note that an alternative to the requirement for a financial contribution exists under the ASCM (n 87) art 1.1(a)(2), in the form of price or income support in the sense of Article XVI of the GATT 1994.

⁹⁹ASCM (n 87) art 2.

¹⁰⁰Accordingly, non-specific subsidies, such as non-specific fuel subsidies, are excluded from the AFS. See generally discussion above at (n 98).

¹⁰¹AFS (n 96) art 3.1.

¹⁰²ibid footnote 4; FAO, ‘International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing’ (2001) para 3.

¹⁰³AFS (n 96) art 3.4.

¹⁰⁴ibid 3.6.

¹⁰⁵ibid art 4.1.

¹⁰⁶ibid art 4.2.

¹⁰⁷ibid art 4.3.

fish related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of a relevant RFMO/A'.¹⁰⁸ This prohibition applies to areas of the ocean not under the competence of an RFMO/A and, therefore, not subject to conservation or management measures beyond the general obligations under the law of the sea (the qualified 'freedom' to fish on the high seas).¹⁰⁹ This obligation is far-reaching, though in the absence of other rules to prevent exploitation such as catch limits, can only go so far.¹¹⁰ Notably, the prohibition is accompanied by special care and due restraint obligations in respect of re-flagged vessels and the granting of subsidies to unassessed stocks.¹¹¹

Special and differential treatment is a core part of the negotiating mandate. With regard to the prohibition of IUU fisheries subsidies, and for 'period of 2 years from the date of entry into force of this Agreement, subsidies granted or maintained by developing country Members, including least-developed country [LDC] Members, up to and within the exclusive economic zone [EEZ] shall be exempt' from action being taken against them.¹¹² In relation to the core obligations on overfished stocks, provision is made for special and differential treatment, whereby 'for a period of 2 years from the date of entry into force of this Agreement, subsidies granted or maintained by developing country Members, including LDC Members, up to and within the EEZ shall be exempt from actions'¹¹³ related to overfished stock fisheries subsidies.

Further special and differential treatment provisions suggest that '[a] Member shall exercise due restraint in raising matters involving an LDC Member and solutions explored shall take into consideration the specific situation of the LDC Member involved, if any'.¹¹⁴ Although couched in imperative terms, it remains to be seen to what extent this provision will be operationally effective. What, after all, is meant by key phrases such as 'due restraint' and how would this be interpreted by a WTO dispute settlement panel, should a dispute arise? This phrasing also appears in other WTO agreements,¹¹⁵ but has yet to be tested in this specific area, as no disputes have yet been raised against an LDC. This provision could, however, be an entry point for the consideration of human rights as part of the 'specific situation' of LDCs.

The AFS provides a further form of special and differential treatment. It directs that developing countries and LDCs 'shall' be provided with technical assistance and capacity-building for the purposes of implementation of the AFS. To that end, a 'voluntary WTO funding

mechanism shall be established in cooperation with relevant international organizations such as the Food and Agriculture Organization of the United Nations (FAO) and International Fund for Agricultural Development'.¹¹⁶ A WTO Fisheries Funding Mechanism¹¹⁷ is being established with such funding envisioned 'to support developing and least-developed countries in implementing a prospective agreement to curb harmful fisheries subsidies'.¹¹⁸ These forms of support could integrate the protection of human rights as an essential component.

That said, as special and differential treatment was a core component of the WTO fisheries subsidies negotiating mandate, the relevant provisions under the AFS are aimed at developing countries and LDCs *in general*.¹¹⁹ Such treatment is not aimed at particular communities, such as small-scale fishers. Moreover, the WTO follows the classification of LDCs promulgated by the UN Committee for Development Policy,¹²⁰ but the designation of developing country status is, in general terms, by self-selection. Such self-selection does little to recognize the heterogeneous nature of developing countries, the make-up of their fishing fleets, or the impact of both subsidization and the removal of such subsidies on particular communities.

The rest of the AFS sets out, *inter alia*, procedural obligations, including provisions to improve the notification and transparency of fisheries subsidies.¹²¹ These provisions obligate Members not only to report on their efforts to implement the AFS but also to provide 'a description of its fisheries regime with references to its laws, regulations and administrative procedures relevant to this Agreement'.¹²² This provision could also provide an entry point to consider the protection of small-scale fishers' human rights in the context of national fisheries law and policy.¹²³ The establishment of a Committee on Fisheries Subsidies¹²⁴ is also mandated under the AFS, with its role directed as being, *inter alia*, to 'review annually the implementation and operation' of the AFS¹²⁵ as well as to 'review the operation of this Agreement with a view to identifying all necessary modifications to improve the operation of this Agreement'.¹²⁶ It has been argued that the Committee could introduce additional human rights-related reporting requirements and put in place other approaches for the consideration of human rights impacts.¹²⁷ Directions on dispute settlement

¹⁰⁸*ibid* art 5.1.

¹⁰⁹S Switzer and M Lennan, 'The WTO's Agreement on Fisheries Subsidies: It's Good but It's not Right' (One Ocean Hub, 23 June 2022) <<https://oneoceanhub.org/the-wtos-agreement-on-fisheries-subsidies-its-good-but-its-not-quite-right/>> and E Morgera, 'Making Progress on the International Recognition of the Human Rights to a Healthy Environment' (One Ocean Hub, 1 June 2022) <<https://oneoceanhub.org/making-progress-on-the-international-recognition-of-the-human-right-to-a-healthy-environment/>>.

¹¹⁰*ibid*.

¹¹¹AFS (n 96) art 5.2–5.3.

¹¹²*ibid* art 3.8.

¹¹³*ibid* art 4.4.

¹¹⁴*ibid* art 6.

¹¹⁵Article 24.1 of the WTO Dispute Settlement Understanding provides that 'Members shall exercise due restraint in raising matters, under these procedures involving a least-developed country Member'. Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401 art 24.1.

¹¹⁶AFS (n 96) art 7.

¹¹⁷WTO, 'WTO Fisheries Funding Mechanism Readied to Provide Support for Ending Harmful Subsidies' (14 June 2022) <https://www.wto.org/english/news_e/news22_e/fish_14jun22_e.htm>.

¹¹⁸*ibid*.

¹¹⁹The exception to this concerns the notification and transparency obligations.

¹²⁰UN Committee for Development Policy, 'List of Least Developed Countries' (November 2021) <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf>.

¹²¹AFS (n 96) art 8. Note that further special and differential treatment is provided in respect of the notification and transparency obligations for 'LDC Members, and developing country Members with an annual share of the global volume of marine capture production not exceeding 0.8 per cent as per the most recent published FAO data as circulated by the WTO Secretariat'; see AFS footnote¹³.

¹²²*ibid* art 8.4.

¹²³FAO, 'Legal and Diagnostic Tool on Sustainable Small-scale Fisheries' (2022) <<https://www.fao.org/documents/card/en/c/cb8234en>>.

¹²⁴AFS (n 96) art 9.

¹²⁵*ibid* art 9.3.

¹²⁶*ibid* art 9.4.

¹²⁷Danish Institute for Human Rights (n 22) 28.

are also set out under the AFS, which will largely follow the structure of the existing WTO Dispute Settlement Understanding.¹²⁸

The AFS will enter into force for WTO members that have accepted it once two-thirds of the 164 WTO members have accepted it.¹²⁹ Reservations are not permitted; once a member has accepted the terms of the agreement, its terms cannot be altered unilaterally. Upon acceptance, the Agreement becomes part of the 'package deal' of WTO membership.

3.3 | What is excluded from the Agreement?

What is not in the Agreement is perhaps as significant as what is in there. Negotiations up until the 12th WTO Ministerial Conference had also focused on a further third pillar, namely, subsidies contributing to overcapacity and overfishing. The November 2021 draft text, for example, contained a general prohibition on the grant of such subsidies, together with an indicative list of the type of the sorts of payments that would fall within the scope of the prohibition. This list included, inter alia, subsidies for the purchase of machines and equipment for vessels, fuel subsidies as well as subsidies for ice and bait as well as subsidies for the costs of personnel, social charges or insurances.¹³⁰ Discussions on subsidies promoting overfishing and overcapacity proved overly controversial, however, during talks at the 12th Ministerial Conference. Rather than risk the failure of the AFS, it was agreed that the Negotiating Group on Rules would continue negotiations on these issues with a view to making recommendations for the next (the 13th) WTO Ministerial Conference 'for additional provisions that would achieve a comprehensive agreement on fisheries subsidies'.¹³¹

The negotiations on overfishing and overcapacity are complicated in that for some developing countries, increasing capacity may align with core development objectives.¹³² In other words, certain countries may wish to enhance fleet capacity for economic reasons.¹³³ As we have mentioned above, capacity subsidies may also contribute to the protection of cultural rights of small-scale fishers. However, excess capacity has been linked to overfishing,¹³⁴ which has the potential to cause a range of deleterious impacts on, inter alia, fish stocks, ecosystem health and, by extension, food security.

The distinction between large- and small-scale fisheries, as discussed above, is extremely complex and complicated further by the fact that developing country status—and hence eligibility to receive special and differential treatment—is based on the principle of self-

selection. In particular, certain developing countries such as Brazil, China and India already have significant fleet capacity but may also host small-scale fishers. Given the heterogeneity of countries claiming developing country status, a fundamental question for negotiations has long been '(w)hat kind of special and differential treatment for developing country members would be "appropriate and effective?"'¹³⁵

In the draft texts¹³⁶ so far, attempts were made to overcome some of this complexity via the adoption of a so-called 'hybrid approach',¹³⁷ whereby a general rule prohibiting such subsidies was accompanied by various exceptions. Most of these exceptions were included under the guise of special and differential treatment and included, inter alia, exceptions for developing countries for activities within their EEZ or areas within the competence of an RFMO/A and for a limited period of time; exceptions for developing countries where the level of their annual marine capture is below a particular threshold; and exceptions for developing countries for 'low income, resource-poor and livelihood fishing or fishing related activities' within 12–24 nautical miles of baselines. Notably, the AFS will be terminated if 'comprehensive disciplines are not adopted within four years of the entry into force of this Agreement, and unless otherwise decided by the General Council'.¹³⁸

As intimated above, what is also missing from the final AFS text is any sort of explicit, special consideration to the needs of specific communities, such as small-scale fishers. In this regard, previous drafts *did* make specific provision for the particular concerns of small-scale, artisanal and subsistence fishers in respect of, inter alia, unregulated and unreported fishing, such as a (bracketed) transition period for such fishers in respect of these activities.¹³⁹ More generally, the situation of small-scale fishers was recognized in previous drafts with particular attention given to income, livelihood and food security concerns,¹⁴⁰ all of which have human rights impacts. Indeed, such concerns were an integral part of the negotiating mandate agreed in 2005, as discussed above.¹⁴¹ The absence of clear provisions addressing the specific needs of small-scale fishers, together with the construction of special and differential treatment as country specific, with

¹²⁸T. Irschlinger and A. Tipping, 'A World Trade Organization Deal on Fisheries Subsidies: Across the Finish Line?' (IISD 2022).

¹²⁹WTO, 'Agreement on Fisheries Subsidies: Draft Text', WT/MIN(22)/W/20 (10 June 2022) (WTO, '10 June Agreement').

¹²⁷WTO, 'Fisheries Subsidies: Draft Consolidated Chair Text', TN/RL/W/276/Add.1 (11 May 2021).

¹²⁸AFS (n 96) art 12. WTO members began discussing how to proceed with the so-called 'second wave' of discussions on fisheries subsidies at a retreat convened in October 2022; WTO, 'Put Landmark Fisheries Subsidies Agreement into Motion, Governments Urged at Public Forum' (28 September 2022) <https://www.wto.org/english/news_e/news22_e/fish_29sep22_e.htm>.

¹²⁹WTO, 'Fisheries Subsidies: Working Document – Communication from the Chair', TN/RL/W/274/Rev.6 (14 November 2018).

¹⁴⁰See, e.g., WTO, 'Draft Consolidated Texts of the AD and SCM Agreements', TN/RL/W/213 (30 November 2007) Annex VIII, art III.2(a), which provides that the prohibition on certain forms of fisheries subsidies would not apply to developing where the subsidies in question 'relate exclusively to marine wild capture fishing performed on an inshore basis (i.e. within the territorial waters of the Member) with non-mechanized net-retrieval, provided that (1) the activities are carried out on their own behalf by fishworkers, on an individual basis which may include family members, or organized in associations; (2) the catch is consumed principally by the fishworkers and their families and the activities do not go beyond a small profit trade ...'.

¹⁴¹Hong Kong Ministerial Declaration (n 94) Annex D, para 9.

¹²⁸Except in respect of any matter under AFS (n 96) arts 3–5, where the provisions of ASCM (n 87) art 4 instead apply.

¹²⁹Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 art X(3).

¹³⁰WTO, 'Agreement on Fisheries Subsidies: Draft Text', WT/MIN(21)/W/5 (24 November 2021) art 5.

¹³¹AFS (n 96) para 4. This paragraph further recognizes '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'.

¹³²A. Tipping, 'Addressing the Development Dimension of an Overcapacity and Overfishing Subsidy Discipline in the WTO Fisheries Subsidies Negotiations' (IISD 2020).

¹³³ibid.

¹³⁴ibid.

non-LDC developing country entitlement largely based on the principle of self-selection, is hence inherently problematic as it does not recognize that fisheries subsidies have significant human rights impacts for these particular communities.

Due regard to the specific needs of small-scale fishers, together with consideration of the human rights–fisheries subsidies connection, may of course (re)appear in the AFS text, in the context of negotiations on overcapacity and overfishing. The Danish Institute for Human Rights has suggested that in the ongoing negotiations, although such subsidies should be subject to a general prohibition, ‘the WTO should also grant leeway to capacity-building subsidies which benefit human rights realisation, such as enabling Members to continue providing capacity-enhancing subsidies that improve economic, social and labour rights realisation, so long as the subsidies do not deleteriously impact biological sustainability’.¹⁴² Nevertheless, as indicated in the previous subsection, the agreed text at present does not exclude the possibility to interpret certain provisions to include human rights considerations, taking into account that the vast majority of WTO members have relevant human rights duties under ICESCR.

3.4 | Reinvesting funds

In addition to the provision or elimination of fisheries subsidies, the reinvestment of funds saved from the elimination of harmful fisheries subsidies can also have positive and negative impacts on human rights. For example, the FAO has argued in support of reinvestment ‘in sustainable fisheries, aquaculture and coastal community livelihoods to reduce the pressure on fish stocks’.¹⁴³ These funds could be used specifically to support the protection and realization of small-scale fishers’ human rights. In this section, we draw on the negative human rights impacts of subsidies that have been identified, including by UN Special Rapporteurs as noted above, to provide insights into how funds from the elimination of fisheries subsidies can contribute to the better protection of human rights and indicate the need for safeguards in deciding on how to reinvest funds.

In effect, international human rights law provides a framework for resource redirection towards the progressive realization of core cultural, economic and social rights.¹⁴⁴ Available funds—including potentially a new WTO Fisheries Funding Mechanism—could thus be used to implement international standards supporting small-scale fishers’ human rights. This can be the case of the introduction of exclusive artisanal fishing zones and exclusive user rights for SSF, where appropriate,¹⁴⁵ or the taking of appropriate measures to favour access to means of transport and processing, as well as facilities for selling

products on local, national and regional markets at prices that guarantee a decent income and livelihood.¹⁴⁶ Addressing income for fishers has been raised as an important element of justice in fisheries governance,¹⁴⁷ though some commentators have raised the possibility of fisher support programmes as potentially ‘ambiguous’ subsidies.¹⁴⁸ Crucially, funds could be used to support knowledge co-production and co-management through the recognition and integration of small-scale fishers’ knowledge and customary norms as part of the protection and full realization of their cultural rights.¹⁴⁹

The reinvestment of funds could also support the fulfilment of special protections for particular categories of rightsholders. For example, reinvestment could support implementation of the Convention on the Rights of the Child in the context of fisheries, with a focus on the promotion of social progress and improvement of living standards for children.¹⁵⁰ Supporting small-scale fishers could be an important strategy for the fulfilment of States’ duty to protect children’s rights that have a close relationship with areas and resources on which they depend for their material needs and cultural life. Equally, supporting small-scale fishers should take into account relevant obligations under the UN Convention of the Elimination of Discrimination against Women, requiring special attention to ensuring their equal participation in development planning.¹⁵¹ Reinvestment could further support the implementation of international obligations related to protecting labour rights¹⁵² and the protection of environmental human rights defenders in the context of fisheries.¹⁵³ On the whole, funds should also be reinvested in a way that supports the full realization of the interlinked rights to food, culture and a healthy environment for small-scale fishers. This in turn benefits the protection of everyone’s human right to a healthy environment via reinvestment that acknowledges the contribution of small-scale fishers’ customary ‘practices and traditional knowledge’ and supports the integration of small-scale fishers, including women and children, in the design and implementation of climate change adaptation and mitigation policies.¹⁵⁴

All these substantive considerations for the reinvestment of funds should not be acted upon in a top-down manner. As noted by Cisneros-Montemayor and others, ‘(m)any fisheries subsidy programs are a legacy of top-down development approaches, and reforms must

¹⁴²Danish Institute for Human Rights (n 22) 27.

¹⁴³UNCTAD, ‘90% of Fish Stocks Are Used up – Fisheries Subsidies Must Stop’ (13 July 2018) <<https://unctad.org/news/90-fish-stocks-are-used-fisheries-subsidies-must-stop>>. See also Radika Kumar et al, ‘The Effectiveness of Fisheries Subsidies as a Trade Policy Tool to Achieving Sustainable Development Goals at the WTO’ (2019) 100 Marine Policy 132, 139–140.

¹⁴⁴ICESCR (n 28) art 2(1).

¹⁴⁵Interim Report of the Special Rapporteur on the Right to Food (n 45) para 61.

¹⁴⁶UNDROP (n 77) art 16.

¹⁴⁷A Giron-Nava et al, ‘Sustainable Fisheries Are Essential but Not Enough to Ensure Well-being for the World’s Fishers’ (2021) 22 Fish and Fisheries 812.

¹⁴⁸UR Sumaila et al, ‘A Global Dataset on Subsidies to the Fisheries Sector’ (2019) 27 Data in Brief 104706. Integrating human rights norms into, for example, assessments of the impact of a subsidy has the potential to change our evaluation of whether a subsidy is harmful, ambiguous or beneficial (see n 30).

¹⁴⁹Morgera and Nakamura (n 69) 72–74.

¹⁵⁰UNICEF, ‘Mapping the Global Goals for Sustainable Development and the Convention on the Rights of the Child’ (2016).

¹⁵¹Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1 art 14(2).

¹⁵²In this vein, see Interim Report of the Special Rapporteur on the Right to Food (n 45) para 39.

¹⁵³For context, see S Febrica, ‘One Ocean Hub Highlights Role and Needs of Small Scale Fishers at UN Consultations on Environmental Human Rights Defenders’ (One Ocean Hub, 28 May 2021) <<https://oneoceanhub.org/one-ocean-hub-highlights-role-and-needs-of-small-scale-fishers-at-un-consultations-on-environmental-human-rights-defenders/>>.

¹⁵⁴UNDROP (n 77) art 18(3).

be co-designed with communities and key stakeholders so that their needs and values are appropriately represented'.¹⁵⁵ Like the prioritization of the needs of vulnerable rightsholders, participation is a basic tenet of the human rights-based approach, which, of course, aligns with environmental law guarantees of participation.¹⁵⁶ Thus, decisions on the destination of the reinvestment of funds should follow procedural human rights guarantees, as also underscored in the SSF Guidelines: ensuring access to timely and adequate information, including on production, processing, marketing and distribution of products,¹⁵⁷ in a language, form and through means adequate to their culture, so that all the interested people can be offered the opportunity to appropriately participate in decision-making processes.¹⁵⁸

Crucially, international human rights law supports the use of impact assessments, particularly for the protection of the human rights of Indigenous peoples and other peasants, women and children,¹⁵⁹ in SSF, which could also be applied with a view to supporting meaningful participation in decision-making processes on reinvestment decisions. As UNDROP and the SSF Guidelines recall, States need to engage in good faith, through proactive and meaningful consultation with their own representative institutions, responding to their contributions, taking into consideration existing power imbalances between different parties.¹⁶⁰ States also need to pay 'special attention to equitable participation of women' and the equitable distribution of the benefits yielded from responsible management of fisheries and ecosystems, rewarding 'small-scale fishers and fish workers, both men and women'.¹⁶¹ The same has been acknowledged in relation to children: States should take into account children's views as part of public participation in decision-making on the reinvestment of available funds.¹⁶² It is through these participatory processes, which 'focus ... on the rights-holder as [the] central concern in response to asymmetries and power imbalances',¹⁶³ that transformative change is co-developed by 'preventing a shifting of the burden of response onto the vulnerable; paying attention to social differentiation, through the lens of non-discrimination; and addressing issues of power and legitimacy'.¹⁶⁴

As discussed above, the AFS special and differential treatment provisions for developing countries and LDCs in respect of the prohibition on subsidies on overfished stocks and IUU fishing grant a grace period or so-called 'peace clause' of 2 years in respect of the removal of such subsidies. This period could be used to allow such countries to

undertake human rights and environmental impact assessment,¹⁶⁵ as well as introduce meaningful opportunities for participation in decision-making for human rightsholders.

In addition, national marine spatial planning processes could support the agency of human rightsholders, notably small-scale fishers, and mutual understanding of different benefits and priorities in reallocating funds from the phasing out of fisheries subsidies. Such dialogues could be informed by interdisciplinary and transdisciplinary research to assist different actors in the respectful and constructive engagement with beneficiaries' choice and capabilities, knowledge systems, and different worldviews of nature and development, and an understanding of different benefits and risks across scales.¹⁶⁶ Research is equally needed to document good practices in this connection, with a view to understanding barriers and opportunities to scale up such practices to the national, regional and international levels.¹⁶⁷

4 | THE OPPORTUNITIES OF INTER-REGIME MUTUAL LEARNING

In this section, we examine how coherent regime interactions at the multilateral level can support the consideration of human rights in respect of the process of subsidy removal and redistribution in the implementation of the AFS. We pay particular attention to pathways for mutual learning between international human rights law, international trade law and international law on sustainable fisheries, with a view to supporting transformative change.

It is notable that human rights language has not appeared at all within WTO negotiations on fisheries subsidies.¹⁶⁸ Nevertheless, there have been various proposals that, if enacted, would have had potentially positive human rights impacts.¹⁶⁹ But the explicit use of human rights language would have brought 'greater precision in terms of the duties and entitlements which flow from recognition', of particular rights.¹⁷⁰ Indeed, skirting or, 'shadow boxing',¹⁷¹ around the explicit identification of human rights implications of fisheries subsidies may diminish the likelihood of mutual supportiveness with international human rights obligations.

¹⁵⁵AM Cisneros-Montemayor et al, 'Changing the Narrative on Fisheries Subsidies Reform: Enabling Transitions to Achieve SDG 14.6 and Beyond' (2020) 117 *Marine Policy* 103970, 2.

¹⁵⁶Examples include Article 14 of the Convention on Biological Diversity (participation in environmental impact assessments).

¹⁵⁷SSF Guidelines (n 63) section 7.10; and UNDROP (n 77) arts 11(2) and 25(3).

¹⁵⁸SSF Guidelines (n 63) sections 3.1(7)–(8) and 11.8; and UNDROP (n 77) art 11(2).

¹⁵⁹E Morgera, 'Biodiversity as a Human Right and Its Implications for the EU's External Action' (European Parliament 2020); and Morgera and Nakamura (n 69) 69–70.

¹⁶⁰UNDROP (n 77) art 2(3).

¹⁶¹SSF Guidelines (n 63) section 5.1.

¹⁶²FAO, 'The International Year of Artisanal Fisheries and Aquaculture 2022' (FAO 2019) 1–2. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 24.

¹⁶³V Bellinkx et al, 'Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Humankind' (2022) 11 *Transnational Environmental Law* 69.

¹⁶⁴Erinosho et al (n 24) 328.

¹⁶⁵Morgera (n 159); and Morgera and Nakamura (n 69) 69–70. These assessments should also be used with regard to subsidies to large-scale fishers: see J Nakamura, D Diz and E Morgera, 'International Legal Requirements for Environmental and Socio-cultural Assessments for Large-scale Industrial Fisheries' (2022) 31 *Review of European, Comparative and International Environmental Law*.

¹⁶⁶M Ntona and E Morgera, 'Connecting SDG 14 with the Other Sustainable Development Goals through Marine Spatial Planning' (2018) 93 *Marine Policy* 214.

¹⁶⁷Erinosho et al (n 24).

¹⁶⁸WTO negotiations on fisheries subsidies bear the document code TN/RL/". A search of these documents for the term 'human rights' OR 'right to health' OR 'right to food' OR 'right to life' produced zero results. The related term 'labour' produced 22 results, but zero results were produced for the document code TN/RL* using the search term 'labour rights'. A search of all documents available on WTO Documents Online (<https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_0005.aspx>) produced 1563 results for the term 'human rights'.

¹⁶⁹WTO, '10 June Agreement' (n 136) art 5.1f; Danish Institute for Human Rights (n 22) 27.

¹⁷⁰P Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harvard Human Rights Yearbook* 39 (writing in respect of the right to development).

¹⁷¹ibid.

That said, mutual supportiveness is an (evolving) general principle of international law resting on good faith efforts to interpret (if not negotiate and conclude) instruments clarifying relationships between related regimes.¹⁷² So a mutually supportive interpretation of the AFS in light of international human rights law is still necessary on the basis of general international law, even if it is not specifically required by the terms of the AFS itself. As noted in Section 1, there is already an extensive literature engaging with mutual supportiveness¹⁷³ and ‘regime interplay management’ between fisheries subsidies and other areas of international law fisheries and environmental protection.¹⁷⁴

We thus now turn to suggesting how to practically apply the relevant international human rights obligations discussed in Section 2 in the context of the implementation of the AFS at the multilateral level, to contribute to the ‘transformative change’ needed to stop biodiversity loss. It is essential not to focus on human rights only from an enforcement or reporting perspective, but rather as a practice focused on implementation through alliance building.¹⁷⁵

We argue that this can be supported at the international level through mutual learning as part of regime interactions between the WTO and FAO in particular. The FAO is a UN body that has already provided expertise to the WTO negotiations. More generally, and through interactions with international environmental processes and increasingly international human rights bodies,¹⁷⁶ the FAO has developed the capacity to support mutually supportive interpretations of sustainable fisheries regimes, international biodiversity law and international human rights law. Advancing a capacity-building-focused engagement with human rights at the international level would therefore require the creation of opportunities for continuous learning between the WTO and FAO.¹⁷⁷

Our focus on mutual learning very much builds on the previous analysis by Margaret Young on regime interactions in relation to fisheries subsidies governance, who emphasized delimited competences and mandates, inaccessible decision-making and parallel state membership as significantly obstructing regime interaction.¹⁷⁸ We also draw on other literature that has pointed to the creative facilitation of constructive regime interactions through ‘instrumental cross-referencing’ and institutional coordination mechanisms to increase the

likelihood of synergistic outcomes,¹⁷⁹ with a view to enhancing capacities to achieve shared governance goals.¹⁸⁰

Although certain FAO departments have already provided review and inputs into the AFS negotiations, it will be important to involve FAO departments with relevant human rights expertise, particularly on Indigenous peoples and small-scale fishers. Mutual learning with FAO on human rights in the context of fisheries subsidies would be crucial to address long-standing concerns that the WTO is both epistemically closed and lacks epistemic capacity to address the environmental and equity concerns around fisheries subsidies. It could also be useful to address the limited public participation in its negotiating procedures compared with multilateral environmental or human rights processes. Although reform of the negotiating procedures of the WTO is unlikely at this time, facilitating regime interaction via processes of learning could be helpful for the implementation of the AFS, notably the WTO Fisheries Funding Mechanism.¹⁸¹ The operation of the funding mechanism—which already foresees cooperation with the FAO—should also include human rights expertise. This would allow negative impacts on human rights to be considered, with impact assessments deployed in line with our discussion above.

In addition, multi-level dialogue will be required with respect to monitoring the implementation of the AFS. One way to exploit opportunities for learning could be facilitated via the obligation under the AFS for a member to provide ‘a description of its fisheries regime with references to its laws, regulations and administrative procedures relevant to this Agreement’.¹⁸² Mutual learning and dialogue on, for example, reinvestment of funds could follow from this obligation. Another critical space for mutual learning is the soon-to-be-established Committee on Fisheries Subsidies. The Committee is tasked to ‘review annually the operation and implementation’ of the agreement¹⁸³ and is explicitly directed to ‘maintain close contact with the FAO and with other relevant international organizations in the field of fisheries management, including relevant RFMO/As’.¹⁸⁴ The WTO Committee system has been recognized by trade scholars as a ‘hidden system’ of WTO governance, capable of producing new norms and shared understandings via a process of deliberation, learning and dialogue.¹⁸⁵ More opportunities for fruitful regime interactions could be exploited through the WTO Trade Policy Review Mechanism, under which the trade policies of all members are periodically reviewed with the aim of ‘achieving greater transparency in, and understanding of, the trade policies and practices of Members’.¹⁸⁶ One of the recognized benefits of the review system ‘has been a learning process about trade reforms and the linkages between trade

¹⁷²Pavoni (n 16) 650–669.

¹⁷³Morgera et al (n 15). See generally Young (n 13) 86 on regime interaction in the fisheries subsidies context.

¹⁷⁴A large array of instruments are relevant to fisheries trade; including UNCLOS, the UN Fish Stocks Agreement, various (non-binding) FAO instruments, the Convention on International Trade in Endangered Species, the Convention on Migratory Species and the Convention on Biological Diversity, as discussed in Young (n 13).

¹⁷⁵This argument has been explored in the subnational context in E Webster and E Morgera, ‘Transformative Capacity Building around a Right to Healthy Environment: What Role for Dignity as a Human Rights Value?’ (2021) 9 Griffith Journal of Law and Human Dignity 55.

¹⁷⁶See the creation of the Indigenous Peoples Unit at FAO and increased interactions with the UN Permanent Forum on Indigenous Issues; as well as a partnership between the FAO and the UN High Commissioner for Human Rights, supported by a collaborative Global North/South research programme—the One Ocean Hub, on advancing the international agenda on small-scale fishers’ human rights as part of the International Year of Artisanal Fisheries and Aquaculture: <<https://oneoceanhub.org/iyafa/>>.

¹⁷⁷Morgera et al (n 15).

¹⁷⁸Young (n 13) 243–244.

¹⁷⁹S Oberthür, ‘Interplay Management: Enhancing Environmental Policy Integration among International Institutions’ (2009) 9 International Environmental Agreements: Politics, Law and Economics 371, 377.

¹⁸⁰Morgera et al (n 15).

¹⁸¹AFS (n 96) art 7.

¹⁸²ibid art 8.4.

¹⁸³ibid art 9.3.

¹⁸⁴ibid art 9.5.

¹⁸⁵A Lang and J Scott, ‘The Hidden World of WTO Governance’ (2009) 20 European Journal of International Law 575.

¹⁸⁶WTO, ‘The Trade Policy Review Mechanism (TPRM)’ <https://www.wto.org/english/tratop_e/tpm_e/tpm_e.htm>.

and other policies' such as the 'linkage between macroeconomic policies and performance and trade policies and performance'.¹⁸⁷ Here, as well as in the other opportunities for regime interaction identified above, the integration of human rights into the implementation of the fisheries subsidies regime promotes systematic engagement with matters of justice and legitimacy through a process of learning.

Regime interaction could also happen outside the trade law regime, for instance, as part of the Universal Periodic Review (UPR) under the international human rights law regime. This process is able to cover the range of a state's human rights commitments, including, for example, national-level programmes alongside treaties.¹⁸⁸ States could potentially report on their use of reinvestments for the realization of human rights, as could civil society organizations. A particular advantage of the UPR process is its basis in peer-review by elected States rather than independent experts.¹⁸⁹ This could, at least to some extent,¹⁹⁰ provide space for peer-learning between parties subject to duties across human rights and trade regimes. There are also some opportunities for individuals and groups to pursue complaints via human rights mechanisms. The entry into force of the ICESCR Optional Protocol in 2013 has provided an additional avenue for accountability of ratifying States. The provision of a complaints route for individuals and groups, and a communications procedure between States, could evolve into a more significant forum for reviewing the interaction of fisheries subsidies and international human rights law if ratifications continue to grow in future.¹⁹¹

5 | CONCLUSIONS

Harmful fisheries subsidies need to be situated within the context of today's unprecedented rate of global biodiversity degradation. To support the kind of 'transformative change' needed to prevent biodiversity loss, a holistic and integrated approach to the regulation and implementation of harmful fisheries subsidies is needed. In this article, we have built on regime interaction scholarship to show the need for inter-institutional learning between the WTO and other international institutions (notably the FAO) that can contribute to addressing the human rights dimensions of fisheries subsidies.

We have focused on the examples of the right to adequate food and to take part in cultural life because they connect fisheries subsidies (whether the provision or removal of perverse subsidies) as they

are protected under international human rights treaties that are widely ratified by WTO members. The regulation of subsidies is situated as a key element of broader linkages recognized over the past decade between international human rights and the SSF sector. We have highlighted how the challenges of sustainable SSF, which 'are interconnected and interdependent and have no boundaries as they encompass social, natural, and governance systems',¹⁹² demand integrated responses that are able to accommodate complexity. We have acknowledged that phasing out fisheries subsidies, which are generally allocated to large-scale fishing operations, supports SDG 14.6 and could have positive impacts on the human rights of small-scale fishers as large-scale fishing is generally in a situation of unfair competition/competitive advantage over the same areas and fish stocks with SSF.¹⁹³ Equally, we have underlined various complexities around the tensions and overlaps between large- and small-scale fisheries. We have argued that human rights considerations can help to carefully navigate these complexities and must be integrated in the implementation of the AFS, as well as the negotiations of the left-over subsidies, with a view to preventing any negative impacts on the most vulnerable and to tackling power imbalances and equity issues that can allow for transformative change across different scales.¹⁹⁴

We do not underestimate the challenge for States in giving effect to their suite of international legal commitments,¹⁹⁵ but the integration of international human rights law can actually allow negotiators and implementers to identify opportunities for policy coherence in line with SDG 17.14. The SDGs are founded on the principles and framework of international human rights law,¹⁹⁶ and no one can be left behind under the WTO fisheries subsidies regime.¹⁹⁷

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¹⁹²A Said et al, 'The Principles of Transdisciplinary Research in Small-Scale Fisheries' in R Chuenpagdee and S Jentoft (eds), *Transdisciplinarity for Small-Scale Fisheries Governance* (Springer 2019) 411, 413.

¹⁹³Schuhbauer et al (2017) (n 41) 117.

¹⁹⁴See generally Erinoshio et al (n 24) 327–330.

¹⁹⁵C Saunders, 'International Regimes and Domestic Arrangements: A View from Inside Out' in MA Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012) 55.

¹⁹⁶The implementation of Agenda 2030 must be consistent with States' obligations under international human rights law: HRC 'Promotion and Protection of Human Rights and the Implementation of the 2030 Agenda for Sustainable Development' UN Doc A/HRC/RES/37/24 (13 April 2018); and HRC 'The Need for an Integrated Approach to the Implementation of the 2030 Agenda for Sustainable Development for the Full Realization of Human Rights, Focusing Holistically on the Means of Implementation' UN Doc A/HRC/RES/37/25 (6 April 2018).

¹⁹⁷In this regard, see generally Boyd (n 188) 20–21.

¹⁸⁷S Laird and R Valdés, 'The Trade Policy Review Mechanism' in M Daunton, A Narlikar and RM Stern (eds), *The Oxford Handbook on The World Trade Organization* (Oxford University Press 2012) 463, 480.

¹⁸⁸See UNGA 'Human Rights Council' UN Doc A/RES/60/251 (3 April 2006). The use of UPR for monitoring States' funding of the SDGs is also recommended by D Boyd, 'The Human Right to a Clean, Healthy and Sustainable Environment: A Catalyst for Accelerated Action to Achieve the Sustainable Development Goals' UN Doc A/77/284 (10 August 2022) paras 54–55.

¹⁸⁹*Ibid* para 7.

¹⁹⁰For a brief discussion of the UPR's 'ability to trigger learning', see V Carraro, 'Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies' (2019) 63 *International Studies Quarterly* 1079, 1085.

¹⁹¹For the current status of ratifications, see <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4>.

DATA AVAILABILITY STATEMENT

No new data were created during this study. Pre-existing data underpinning this publication were obtained from NPL and are subject to licence restrictions. Full details on how these data were obtained are available in the documentation available from the University of Strathclyde KnowledgeBase at <http://doi.org/10.15129/a1234b56>.

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