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A Jurisdictional Assessment of International Fisheries Subsidies Disciplines to Combat Illegal, Unreported and Unregulated Fishing

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Abstract: Fisheries subsidies regulation lies at the intersection of international fisheries and international trade governance regimes. Although eradicating harmful fisheries subsidies cannot be a panacea for illegal, unreported and unregulated (IUU) fishing, it is an essential first step to confront the problem head-on. The multilateral Agreement on Fisheries Subsidies, adopted by the World Trade Organization (WTO) in June 2022, provides an impetus for sovereign states to steer fisheries subsidies reform towards commonly agreed legality, sustainability and transparency benchmarks. This legal and policy investigation aims to give increased attention to the ultimate responsibility of national governments to exercise active fisheries jurisdiction over the identification and sanction of IUU fishing activities. With or without WTO prior judgements, a level of jurisdictional coherence is warranted to trigger a comprehensive and effective ban on IUU fisheries subsidies in as timely a manner as possible.

Keywords: fisheries jurisdiction; IUU fishing; fisheries subsidies; UNCLOS; WTO; FAO; regime interaction

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1. Introduction

Illegal, unreported and unregulated (IUU) fishing has been denounced as a transnational and organized activity by the Food and Agriculture Organization (FAO) of the United Nations (UN) since 2001. Pursuant to paragraph 3 of the FAO International Plan of Action to Deter, Prevent and Eliminate IUU Fishing (IPOA-IUU), marine capture fisheries are condemned if they: (1) breach any valid national, regional or international laws and regulations aimed at the conservation and management of fisheries; (2) do not report or misreport harvested catches to competent national authorities or regional fisheries management organizations or arrangements (RFMO/As); or (3) operate stateless or non-party fishing vessels in RFMO/A-covered regions or in such manners as detrimental to living marine resources on the high seas [1]. IUU traded seafood is estimated between 7.7 and 14 million metric tons per annum, leading to gross economic revenues of USD 8.9 to 17.2 billion [2]. It is no secret that substantial capacity-enhancing subsidies, totalling over USD 22.2 billion in 2018, and appropriated by the world's leading fishing economies, notably, China, the European Union (EU), Japan and South Korea [3], have fuelled the permeation of industrial distant-water fishing fleets worldwide [4]. When national supportive measures have, advertently or inadvertently, contributed to IUU fishing and associated criminal offences, such as smuggling, slavery and labour abuses at sea [5], they arouse grave and widespread legitimacy concerns beyond environmental degradation.

Although eradicating harmful fisheries subsidies cannot be a panacea for IUU fishing, it is an essential first step to confront the problem head-on. After a more than 21-year marathon of rule-based negotiation and political trade-offs, the international consequences have eventually crystalized on IUU fisheries subsidies under a new subset of multilateral trading rules. On 17 June 2022, the 12th Ministerial Conference of the World Trade Organization (WTO) adopted the brand-new Agreement on Fisheries Subsidies (AFS) upon

consolidated draft texts to propose legally binding norms on all 164 Member States and their fisheries management systems [6]. Due to unresolved political impasses, the AFS has carved out a preliminary set of norms targeted at the most conspicuous forms of unsustainable fishing: IUU fishing, fishing on overfished stocks and the unregulated high seas. A wide residual category of overcapacity and overfishing (OCOF) subsidies, together with other sticking points (e.g., forced labour and non-specific fossil fuel subsidies), are scheduled for further negotiations in the next four years towards the 13th Ministerial Conference [6]. Albeit a slimmed-down agreement, the AFS is ground-breaking in that it achieves, for the first time, almost global unanimity on the rigorous de-coupling of IUU fishing from any official support, either in budgetary or implicit forms. In this vein, the interim agreement heralds a firm targeted approach towards achieving a high common standard on preserving sustainable fisheries through trade and economic policy reforms.

A subsidy is defined under the WTO as the financial contribution made by a government or a public agency to confer income or price support insofar as it renders a specific recipient better off in market competition [7]. Subsidization is a multifaceted tool of national regulation in terms of its underlying economic rationale, policy objectives, trade impacts and, increasingly, environmental externalities [8]. Even today, there is a globally "uneven and incomplete" understanding of the relative merits and disadvantages of subsidies against other policy tools [9]. The overall quantity and verifiability of information on national subsidy programs remains "weak", and even more "scarce" for fisheries subsidies [9]. In consequence, the bold initiative to restrain the use of fisheries subsidies has stimulated as much controversy in policy deliberations as in academic discourse. The political and intellectual debates have largely dwelt on, *inter alia*: (1) a top-down or a bottom-up negotiation approach for identifying and prohibiting certain harmful subsidies [10]; (2) the sub-categorization of good or bad fisheries subsidies according to their use, form or impact [11,12]; (3) the scope and *de minims* thresholds for developing countries, including least-developed countries (LDCs), to exempt from a principled ban [13,14]; (4) the ways to apply external scientific parameters when necessary, such as "international best practices" and "maximum sustainable yields" [14]; (5) the inclusion of minimum monitoring and transparency rules on non-specific fuel subsidies [15,16]; and (6) other miscellaneous provisions regarding notification, dispute settlement and cross-institutional cooperation to promote and depoliticize treaty operation [8,17].

The hard-won agreement is endowed with a level of clarity to dissolve part of divergences, while leaving the door open for progressive talks on more sensitive issues. To inform the normative development ahead, this legal and policy study offers an investigation of the jurisdictional nexus between international fisheries and international trade governance regimes overlapping at the core subject of fisheries subsidies [18]. Under that jurisdictional lens, it seeks objective and rule-based evidence as to the central question of whether the global supply chain of capture fisheries has been fully covered by the international agreement. If not, the follow-up inquiry is about how to enlarge the room of inter-regime interaction and coordination between trade and fisheries with a view to comprehensively eliminating government support to IUU fishing [18]. To this research purpose, Sections 2 and 3 outline, respectively, the notion and dissimilar features of jurisdiction under international fisheries law and international trade law, while discussing their respective contribution to framing the new fisheries subsidies toolset. Section 4 follows by evaluating the potential and limitations of the new legal instrument to stem IUU-caught fish from entering an ever more complex and globalized seafood supply chain from bait to fork. It thereby forecasts the evolving trend to close various checkpoint loopholes, with the imperative to deepen effective and collaborative state jurisdictions along the entire chain. The final section summarizes the key findings and calls for critical thinking about how the WTO can develop more comprehensive and inclusive fisheries subsidies norms in the years to come.

2. A Multiplicity of Jurisdictional Bases to Manage and Conserve Global Fisheries

Either in legal history or practice, jurisdiction remains an elusive but significant and thriving concept to build inquiries and insights into the administration of international law [19]. At the risk of oversimplification, the legal term can be broadly defined as the power or authority of a sovereign state to make (i.e., prescriptive jurisdiction), decide (i.e., adjudicative jurisdiction) and enforce (i.e., enforcement jurisdiction) the rule of law within its territory upon persons, objects and conduct [20,21]. The specific realms for state jurisdiction to take effect normally encompass civil, criminal and administrative matters within the territory of a state. Relatively recently, jurisdiction has been exercised, in varying degrees and characterization [22], beyond national spatial limits in these matters pertaining to trade, investment practices, cross-boundary environmental threats (i.e., extraterritorial jurisdiction) and specified international crimes (i.e., universal jurisdiction) [20]. It is thus fair to say that a hallmark of the modernization of jurisdiction is the reasonable extension of state authority to govern and preserve well-defined "cosmopolitan/common" interests, in addition to narrowly focused "individualist/national" interests [21,23].

Allocating state jurisdiction in the international legal regime for fisheries has been a refined work of art to adapt general legal theories to the peculiarities of marine spaces. The 1982 UN Convention on the Law of the Sea (UNCLOS) divides the world's ocean into "multiple jurisdictional zones" administered under national jurisdiction, including internal waters, territorial seas, international straits, archipelagic waters, the contiguous zone, the exclusive economic zone (EEZ) and the continental shelf, and beyond, namely, the high seas and the Area (i.e., seabed, ocean floor and subsoil thereof) [24]. Although the Convention does not prescribe the exact terms for "fisheries jurisdiction", its zonal approach implies that the differing powers to regulate fishing and fishing-related activities are ascribed to states within specific maritime boundaries.

For fishing grounds falling under national maritime zones, they are subject to a wide spectrum of coastal State jurisdiction as codified and distinguished in the UNCLOS from Parts II to VI. The regulatory breadth comes as no surprise since the "'enclosure' of vast ocean areas within the EEZs of States" means they are home to approximately 90 percent of marine living resources [21]. A key distinction exists between strictly "territorial" fisheries jurisdiction and fisheries jurisdiction within the EEZ of a littoral State. The former sub-category is intrinsically empowered by the state's "complete" and "exclusive" sovereign control of its marine territory, which is geographically limited to internal waters, territorial seas, international straits and archipelagic waters [24]. The spatial nature of territorial jurisdiction denotes that the state exercises almost full prescriptive, adjudicative and enforcement authorities over fishing activities and fishermen within the territory in question, despite their nationality or location of registry. The allegation of exceptional rights by other states, e.g., the right of innocent passage [25], is more circumscribed than an upfront jurisdictional challenge to the coastal State. In practice, it is in the reach of national fishermen and domestically-registered fishing vessels that the coastal State jurisdiction coincides with that of the same State of nationality and the flag State, respectively.

Underpinned by a distinct legal standing, the coastal State's fisheries jurisdiction within its EEZ, which is extended up to 200 nautical miles from national baselines, has materialized as "sovereign rights" over the marine living organisms enclosed therein under the UNCLOS Article 56.1(a). The artificial notion of EEZ, giving rise to a "specific legal regime" in the words of Article 55, embodies a historical compromise reached between two contrary at-sea winds: the wind of freedom in navigation and trade sought by maritime States vis-à-vis the wind of sovereignty defended by littoral States [26]. By reference to that, the sovereign rights of littoral States to explore, exploit, manage and conserve fisheries outward in their EEZ bands indicate a principal, but not exclusive, type of fisheries jurisdiction.

For one thing, although coastal States enjoy certain priority to domesticate their fishing rights in the EEZ, their overarching obligation under the UNCLOS Article 62.1 is to "promote the objective of optimum utilization of the living resources", which includes

allowing other states to access surplus fish stocks on mutually agreed legal terms. For another, under Article 56.2, when exercising their jurisdiction in EEZs, coastal States should "have due regard to the rights and duties of other States" who may possess and assert their co-existing flag State or State of nationality jurisdiction over the same matters. It is in such economic uses and normative contours that the EEZ jurisdiction sets itself apart from other forms of jurisdiction, allegedly for a "functional" purpose [21]. When qualified as functional and not territorial fisheries jurisdiction, the coastal State's formulation, adjudication and enforcement of fisheries instruments in the EEZ is not without legal bounds and concurrent jurisdictional influences. An often-cited example is the advisory opinion of the International Tribunal for the Law of the Sea (ITLOS) that a given flag State has a "due diligence" obligation or obligation of conduct, in addition to the primary coastal State responsibility, to ensure that private vessels flying its flag comply with the laws and regulations adopted by the coastal State when operating in the foreign EEZ.

The third subset of jurisdictional powers bestowed to fishing States demonstrates a further erosion of territorial connectivity, as no nation can legitimately establish ownership of any other marine spaces outside the scope of territorial and EEZ jurisdictions under the UNCLOS Article 86. The high seas are governed by the principle of various freedoms, including the freedom of fishing, and subject to the exclusive jurisdiction of the flag State. However, once prominent in history, the freedom of fishing is conditioned upon the rights and duties of the flag State to "exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag" pursuant to Article 94.1. Unlike territorial and EEZ jurisdictions limited by a spatial dimension, the flag State has the principal responsibility to ensure respect for national and international rules relating to the exploitation and conservation of marine species, despite where its flagged-vessels and members of crew operate on the high seas.

Operated as a *sui generis* regime of jurisdiction between the influences of territoriality and nationality, the flag State's authority to regulate fishing-related practices on board is guaranteed without the interference of third States [21]. Yet, an exceptional problem arising from high seas fisheries is the not unusual abuse or inaction of flag States, particularly "flags of convenience" and "flags of non-compliance" States, when they are unwilling or incapable to address hazardous harvest practices [21,24]. In consequence, to restore a healthy balance between community and individualist interests, the post-UNCLOS era has witnessed the rise of more specific binding agreements, e.g., the 1993 Compliance Agreement [27], and non-binding instruments, e.g., the 2014 Voluntary Guidelines for Flag State Performance [28], to reinforce the effectiveness and primacy of flag State responsibilities for the sustainability of high seas fisheries.

Last but not the least, the hindsight that flag State jurisdiction alone is nowhere near adequate to preserve global commons has given rise to some 40 inter-governmental RFMO/As, through which groups of like-minded states act collectively to manage and conserve certain marine living resources such as tuna or multispecies within specified high seas areas. Power delegation implies that the RFMO/As enjoy a supranational level of fisheries jurisdiction according to the needs and expectations of the flag States operating in the covered regions, and relevant coastal States when the covered fish species traverse into their adjacent EEZs [25]. It is elaborated further in the 2001 UN Fish Stocks Agreement that coastal States and states fishing on the high seas bear the "duty to cooperate" to preserve valued straddling and highly migratory fish stocks via collaborative measures and enforcement action [29].

The feature of exercising state jurisdiction through the RFMO/As' proxy is self-evident in two patterns. For one thing, the conferral of jurisdictional powers to RFMO/As does not deprive the independent authority of the States of origin (flag, coastal and nationality) on fisheries management and conservation. For instance, with respect to fish species not covered by the mandate of RFMO/As or enforcement measures that cannot be carried out by abstract regional institutions (e.g., boarding, inspection and arrest), constituent parties retain important enforcement powers to give effect to the agreed regional rules [21]. For

another, whether the parties decide to act in unison upon RFMO/A authorizations, such as group embargos against the at-sea transhipment of IUU-caught fish, or to take more responsive and precautionary measures, such as a higher rate of on-board inspection, they should proceed in a mutually reinforcing fashion. The significance of having not only co-existing but also collaborative fisheries jurisdictions can be described as a necessary corollary of the delegated nature of RFMO/As' fisheries jurisdiction and the ultimate responsibility of sovereign states to hold their fishermen and fishing vessels accountable to the rule of law.

3. Integration of Fisheries Jurisdiction into International Subsidy Norms

As vaguely defined under international fisheries law, jurisdiction also escapes a universal and clear-cut method of conceptualization in the international legal regime governing trade. Implied by its treaty language [30], the WTO, through dispute tribunals, exercises jurisdiction within the exclusive locus of adjudication, i.e., a jurisdiction to apply and clarify, rather than make, the law [31]. Within a member-driven organization, the prescriptive and enforcement functions of jurisdiction sit in the hands of Member States, as evidenced by their protracted negotiations of fisheries subsidies rules over the past two decades. The division between an institutional jurisdiction over judicial claims and constituent Members' more comprehensive jurisdiction over rule-making and rule-enforcement processes determines a two-step order in WTO legal assessment: an illegal finding notified by a Member State and, when voices of dissent are heard, the intervention of institutional bodies, e.g., the Committee on Fisheries Subsidies and the Dispute Settlement Body [6], to scrutinize, support or disapprove that claim.

As the study centres on IUU fishing, the summary provided in Table 1 below illustrates the AFS norms considered most relevant to combating IUU fishing from a jurisdictional perspective. As it can be seen, a three-pronged jurisdiction is apportioned among competent Member States to establish, respectively, affirmative IUU determinations, the prohibition of fisheries subsidies and a limited exemption applicable to developing countries.

Table 1. Allocation of jurisdiction in the legal determinations on IUU fishing, fisheries subsidies and exemption.

		Coastal State	Flag State	RFMO/As	Subsidizing State
Affirmative IUU determinations	Territorial sea	√			
	EEZ	√	√		
	High seas		√	√	
Prohibition of fisheries subsidies		√	√		√
Developing country exemption	Territorial sea	√			√
	EEZ	√			√

Notes: "√" indicates the conferral of a specified type of jurisdiction to the relevant state or RFMO/A.

Firstly, pursuant to Article 3.2 of the AFS, three types of state entities possess the exclusive authority to establish a *prima facie* case of IUU fishing: (1) a coastal State for activities under its jurisdiction; (2) a flag State for activities by vessels flying its flag; and (3) a relevant RFMO/A in areas and for species under its competence. An affirmative determination refers to the final finding of IUU fishing by the state or the final listing of IUU vessels by the RFMO/A [6]. Neither the WTO nor other international bodies such as the FAO should become involved in or prejudge the substantive nature and scope of such prior determinations [32]. The autonomous character of IUU fishing identification is also reflected by the lack of a hierarchical structure among the empowered entities. In principle, every qualified entity can make a legitimate and parallel judgement within its scope of maritime jurisdiction. Each independent identification of IUU fishing holds an equal opportunity to trigger a multilateral investigation of the legality of appropriated subsidies.

The affirmative determination made by one regulatory entity cannot be automatically "nullified or negated" by a negative determination made by another, and vice versa [32].

It deserves noting that the absence of spatial limits in respect of a flag State's IUU identification under Article 3.2 reaffirms its diverse fisheries jurisdiction across the territorial sea, national and foreign EEZs and the high seas under international fisheries law. It follows that the flag State's determination on the engagement in IUU fishing by domestically registered vessels can be made either interpedently or concurrent with, but not overridden by, the judgement of a competent coastal State or RFMO/A. Such parallelism in IUU determination virtually reflects the middle-way approach of the WTO to focus exclusively on devising fisheries subsidies disciplines. By way of this, the AFS avoids creating any legal presumption about the credibility of any governmental initiative to launch an IUU investigation and to make any affirmative or negative final finding [6].

Secondly, the next critical move undertaken by the negotiators is to pin down concrete rules on subsidies contributing to IUU fishing, which serve to uphold the basic prohibition against IUU-related fisheries subsides under Article 3.1. The scope of the prohibition covers both vessels and operators, and both fishing and fishing-related activities at sea under footnote 5. The notion of "operator" is defined broadly to include the owner, director (e.g., shareholder) or controller (e.g., captain) of a vessel, and hence impacts invariably natural and juridical persons under Article 2(e). "Fishing related activities" encompass all means of at-sea support of direct fishing, including landing, packaging, processing, transshipping and transporting of catches, as well as the provisioning of personnel, fuel, gear and other supplies under Article 2(c). The wide array of subsidy recipients bears witness to the status quo of regulatory diversity and heterogeneity across national fisheries subsidies schemes. Devising all-inclusive arrangements ensures that the subsidizing State will need to prohibit or withdraw all relevant subsidy elements facing a valid IUU determination, whether it is established by itself or other competent jurisdictions.

A separate attribution rule contained in footnote 3 clarifies that a subsidy is attributable to any state conferring it, regardless of the flag or registry of the vessel or the nationality of the operator involved. The recognition is consistent with the generic subsidy rules under the WTO whereby the nationality of recipients is an irrelevant factor in the determination of subsidies, as long as they are operating within the jurisdiction of the granting authority. For example, the possibility for fishing vessels or operators to receive tax remissions from a foreign state when fishing in its EEZ zone cannot be excluded, as Member States are merely encouraged to "take special care and exercise due restraint when granting subsidies to vessels not flying its flag" under Article 5.2. Foreseeably, the foreign subsidy in question will be subject to the same level of legal scrutiny as flag State subsidies under the attribution rule. It is in this connection that the trade terminology of subsidizing State interacts closely with the fisheries jurisdiction conferred by the UNCLOS to flag and coastal States. When the subsidizing State is the same State of origin, it is more convenient for the granting authority to "take into account the nature, gravity, and repetition of IUU fishing . . . when setting the duration of application of the prohibition" under the first sentence of Article 3.4. If there is any difference in the source of jurisdiction, the prohibition should be applied at least as long as a foreign IUU determination or RFMO/A listing remains in force, whichever is the longer according to the second sentence of Article 3.4. The requirement thus imposes a compelling obligation on the subsidizing State to take the legal principle of "proportionality" into account, when determining the duration of the subsidy prohibition [32].

And thirdly, the prohibition against IUU fishing-related subsidies is moderated by a limited exemption applicable to developing countries and within circumscribed national maritime zones. According to AFS Article 3.8, subsidies granted or maintained by developing countries, including LDCs, are exempt from sanctions and dispute settlement procedures for a period of two years after the entry into force of the agreement. In the previous draft, the qualification of subsidization purpose, i.e., "for low income, resource poor and livelihood fishing or fishing related activities", is no longer retained. Meanwhile, the territorial range for fisheries subsidies to play a role is extended from the territorial

sea "up to and within the exclusive economic zone" under Article 3.8. In comparison, the current transitional allowance is more responsive to the economic hardships or capacity restraints of certain littoral developing states to accelerate the reform of national fisheries subsidies schemes according to international best practices.

Given that the exceptional clause is meant to address "the unique and vulnerable circumstances of the artisanal fisheries sector" [32] and the reality that developing countries rarely fish outside their EEZs, the subsidizing State is more likely to be the same as the coastal State in regard to both IUU fishing identification and the prohibition of subsidies. In this respect, the possibility for foreign fishing vessels or operators to receive any financial support from a coastal developing state poses a question for uncertain treaty interpretation. It is submitted accordingly that, albeit not otherwise elucidated under the provision, neither foreign distant-fishing vessels nor their supportive flag States should be allowed to seek similar derogation from the prohibition within the specified 2-year period A reading of the relevant provisions in good faith and in the context of the purpose of negotiations immediately denies such permission. This is because it can considerably undermine the objective shared by the two international legal regimes to confront the most problematic IUU practices conducted by the world's industrial fishing fleets, rather than small artisanal fishers.

4. Has the Entire Seafood Chain Been Covered by Inter-Regime Jurisdictional Arrangements?

The global consensus on addressing the phenomenon of IUU fishing in a holistic and interactive manner has been achieved early under the IPOA-IUU. The international guidelines against IUU fishing adopt a highly integrated approach based on two crucial pillars. Article 9.1 emphasizes a participatory and multi-stakeholder paradigm of governance through strengthening inter-governmental, inter-organizational and public–private partnerships. Article 9.3 creates a sound legal expectation on the engagement and contribution of all state measures, ranging from flag, port, coastal and market State measures, to the measures adopted by the State of nationality, to eradicate the fundamental causes and various impacts of IUU fishing in concert. It is thus opportune for the AFS to herald the integrated approach by incubating inter-regime and cross-jurisdictional responses to IUU fishing. Leveraging subsidy disciplines to ameliorate serious environmental detriments (i.e., fish depletion) at the core, instead of the margin of global trade policy, is a groundbreaking movement towards achieving sustainability in balancing terms (i.e., economic, environmental and social sustainability). The effective implementation of the agreement ahead has the potential to inform additional constructive agendas on resolving sustainability issues involved in global supply chains of nature-dependent products. Based on the nexus of jurisdictions analysed above, the following discussions investigate to what extent and through what viable means the economic incentives given to IUU fishing in the form of subsidy can be removed from the point of catch until the final phase of consumption.

4.1. Jurisdictional Friction and Vacuum

To recall the findings contained in Table 1 above, the discretion to investigate and bring IUU fishing under the ambit of international subsidy disciplines is equally distributed among flag, coastal States and their alliance through RFMO/As. As a matter of textual design, states' affirmative IUU determinations are not exclusive to each other. Nonetheless, the real world sees non-negligible probabilities of conflicting judgements on IUU fishing especially in disputed waters, or a sheer void of IUU determination since the AFS imposes no prior obligation on governments to penalize IUU fishers in each case. For example, a foreign distant-fishing vessel could be captured as violating a coastal State's mandatory inspection rules, while the flag State may cite language barriers or technical errors to disqualify any deliberate IUU intent [33]. For another, it is not uncommon for flag State authorities to insufficiently police their vessels operating in IUU "hot spots", such as the western EEZs of Africa, which are covered by scant regulation of certain corrupt coastal

States [34]. On the high seas, it also occurs too frequently for contracting parties to oppose or not to accept a management and conservation measure adopted by the RFMO/A to which it is a party [35]. On one hand, the negligence or omission by competent states to publicize and sanction IUU fishing erects an insurmountable obstacle for the WTO to launch an in-depth legitimacy review of fisheries subsidies. On the other hand, given the fact that the subsidizing State can be the same State of origin (i.e., flag or coastal, as indicted in Table 1 above), its diverging assertion on the nature of fishing conducted by national vessels against other states' IUU allegations may cause the multilateral subsidy ban to eventually fall through.

The unorthodox challenge of jurisdictional friction or vacuum is fundamentally attributable to the confluences of, among other things, (1) the vague configuration of IUU fishing activities by continuous reference to the non-binding IPOA-IUU; (2) the same level of ambiguity on the (dis)qualification of sustainable fisheries under the Code of Conduct for Responsible Fisheries, standing as another non-binding FAO protocol [36]; and (3) the dissimilar membership composition among the UNCLOS, the WTO, the FAO and RFMOs, which heightens caution about the transplantation of other institutional norms to apply to non-parties [18]. As a result, at the state level, national governments are entrusted with too much latitude, as they see fit, to apply their own understandings of the scope and content of international guidelines in respect to IUU fishing on a case-by-case basis. At the international level, the state of play creates a constant flow of uncertainties about how to mitigate the rise of conflicting allegations from the past to the future and, above that, how best to pool jurisdictional powers into coherent resonance for the purpose of punishing IUU fishing to the greatest possible extent. The current multiplicity of jurisdictional bases to regulate IUU fishing should become part of the solution, not the problem, when working in partnership with international subsidy norms.

The legal assurances provided by the AFS to minimize overly subjective IUU determinations seem rather aspirational and formalistic, but not clear or decisive enough to integrate all relevant paradigms of jurisdiction. On the interaction between coastal and flag and, "if known", subsidizing States on the determination and sanction of IUU fishing, Article 3.3 sets forth a group of procedural checks alone. These include the coastal State's provision of "relevant factual information", timely notification, and information exchange through dialogue or written forms if requested by the flag or subsidizing State under footnote 9. The procedural obligations are performed on the states' cooperative initiatives and "up to the coastal Member to specify how the information exchange should be carried out" [32]. Hence, the AFS refrains from imposing any prescriptive form of information exchange or timeframe to alleviate the possibilities of conflicting judgments or non-cooperation between states. Another non-negligible flaw with the arrangement is that the communication of IUU findings operates as a one-way route between the coastal State vis-à-vis the flag State and/or the subsidizing State. The coastal State is obligated to invite consultation with other competent states prior to making a determination, when foreign fishing vessels are suspected as liable culprits jeopardizing its EEZ resources or neighbouring high seas. It remains ambiguous if the flag State should discharge a similar "due process" obligation in respect of national vessels identified by itself as violators of coastal or domestic rules. As articulated by the ITLOS opinion above, the flag State always bears a concurrent and complementary obligation of conduct over their fishing vessels operating in the EEZs of third States.

On the factual benchmark, the previously proposed term "positive evidence" gives way to the broad formulation "relevant factual information", consequently "leaving no room for the quality of that information to be questioned or judged in the WTO" [32]. The characterization of IUU fishing is typical of "how-produced standards" pertaining to national environmental protection goals [8]. Even when community interests against IUU fishing are at stake, each state's "internal perception and definition of environmental risks", e.g., destructive fishing practices, do not necessarily converge [8]. Nor has the WTO's jurisprudence on the legitimacy of unilateral trade measures based on production and

processing methods (PPMs) unincorporated into seafood products, such as destructive catching methods or gear, evolved on a definite path [37]. The double risk of a merely proceduralist approach deserves caution. First, it may incentivize a national proceduralist move to circumvent more substantive WTO norms by simply ticking the procedural checklist, as currently endorsed in the AFS [38]. And second, a minimalist but not de novo review conducted by the WTO per procedural preconditions may deprive itself of any substantive say about the suitability of trade-related environmental measures [38]. So far, the fisheries subsidies disciplines have largely reinforced, rather than overturned, a systemic shift of the WTO to move from "value judgment" of national choices towards multilateral "procedural empowerment" [38].

4.2. Inter-Regime Linkages between Trade and Fisheries

The proceduralist rubric contained in the AFS is influenced by a spirit of de-sensitization that has long been cherished by the WTO towards cross-cutting issues. As a non-standard setting body, it is at ease with "choosing which standards to import and under what mechanisms" under relevant trade agreements [8]. Acknowledging the advantages of indirectly learning from professional standardisers, the fisheries subsidies norms do not create more direct and substantive channels of institutional cross-fertilization. Under the AFS provisions, the FAO is authorized with a limited role to assist in: (1) the definition of IUU fishing by reference to the IPOA-IUU; (2) the establishment of a voluntary fund to provide technical and capacity building assistance to developing countries under Article 7; and (3) the updating of global fisheries data under footnote 13. Moreover, Article 9.5 contains exhortatory language that "close contact" should be maintained by the Committee on Fisheries Subsidies with the FAO and "other relevant international organizations in the field of the fisheries management, including relevant RFMO/As". With respect to the role of RFMO/As, all decision matters relating to the final IUU listing are kept internal, and hence not to be second-guessed by the WTO. The value of complementary expertise from the ITLOS and other relevant organizations, including industry, fishing communities and non-governmental organizations, is thus not recognized to echo the principle of public–private partnerships enshrined in the IPOA-IUU.

The lack of strong inter-regime linkages casts doubts on the ultimate enforceability of the multilateral subsidy prohibition if intractable jurisdictional problems arise from time to time. In this respect, Article 11.3 places a general legal presumption against the AFS to "be construed or applied in a manner which will prejudice the jurisdiction, rights and obligations of Members, arising under international law, including the law of the sea". Yet, it is not known whether the WTO should actively engage in resolving any jurisdictional discrepancies or void, first and foremost. If the WTO prefers to accord total deference to states' independent and parallel determinations on IUU fishing, it is optimal that any prior controversies will be settled properly outside its theatre, e.g., under the rules and procedures of the UNCLOS and relevant RFMO/As, before they proceed to a subsidy test. Alternatively, if the WTO aims to retain a co-mediator's function, the obvious candidates for taking on such institutional responsibility will be the Dispute Settlement Body and the Committee on Fisheries Subsidies.

In the current mandate, a WTO dispute panel is required not to "base its findings on any asserted territorial claims or delimitation of maritime boundaries" under Article 11.2(b). Although maritime delimitation is the primary step to establish and differentiate states' fisheries jurisdictions, there is no *a priori* exclusion of specific IUU determinations made later by a given state within the consideration of a WTO panel. The non-exclusionary nature of WTO's judicial examination of trade-related maritime disputes is amply reflected in the *Chile—Swordfish* case, which triggered parallel legal proceedings in the WTO in 1990 [39] and the ITLOS in 2000 [40]. As a result, it is questionable whether "forum shopping" behaviours can be entirely precluded by the general caveat in Article 11.2(b), if states continue to exploit concurrent international legal commitments against each other in the future.

In the meantime, a multilateral process of notification and consultation is mandated under Article 3.3 regarding a coastal State's ad hoc listing of IUU vessels, and under Article 8 to entertain a wider array of information requests by the Committee, as well as additional information requests by other Members. Each Member should "notify the Committee in writing on an annual basis of a list of vessels and operators that it has affirmatively determined as having been engaged in IUU fishing" under Article 8.2, as well as individually or as a group, the IUU lists updated by RFMO/As to which it is a party under Article 8.6. Nonetheless, it is admitted as a cornerstone consensus among the negotiators that "notifying a measure [including an IUU listing or sanction] under the Agreement does not prejudge its legal status, effects or nature" [32]. In principle, putting all Members on notice simply creates the institutional space and opportunities for counterarguments, legal reasoning and substantiation. A stepwise deliberation process helps seek for an amicable compromise among interested governments [38]. Yet, being either deliberation or adjudication, there is no prescribed room to invite a substantive peer review by international or regional organizations in charge of maritime jurisdiction or fisheries management [18], or their participation in overseeing procedural matters, such as the nomination of fisheries or environmental panellists [41]. Hence, the built-in procedural safeguards represent, at most, the self-accreditation by the WTO to monitor member-driven problem-solving processes, rather than the accreditation of parallel organs to give decisive expert opinions [18].

4.3. Port State Jurisdiction over the Transit of IUU Fish

Port State jurisdiction is a relatively recent concept in the post-UNCLOS development of international fisheries law. Although a universally accepted definition is still lacking, port State measures are expressly covered in the Fish Stocks Agreement and other soft-law instruments, which inform the 2009 Port State Measures Agreement (PSMA) [21]. The PSMA is the first multilateral agreement to specifically address IUU fishing via the implementation of effective port State measures [42]. Under the PSMA Article 9, each Party, in its capacity as a port State, is obligated to deny access into its ports by foreign-flagged vessels engaged in IUU fishing and supportive activities "for landing, transshipping, packaging, and processing of fish and for other port services including, *inter alia*, refuelling and resupplying, maintenance and drydocking". Although the port State exercises investigative powers as part of its territorial sovereignty over internal harbours [21], it should promptly communicate the result of each inspection with "the flag State and, as appropriate, relevant coastal States, RFMOs and the State of which the vessel's master is a national" under Article 18.1(a). Yet, the provision should not be read as a legal requirement of the consent of the States of origin before proceeding to a port denial decision. The notified flag State has a mutual obligation to ensure its vessels comply with port State inspections under Article 20.1, and to take investigative and enforcement actions without delay in accordance with its laws and regulations under Article 20.4. Hence, in many cases where jurisdictional duties overlap, the two sides should endeavour to cooperate to cast IUU-caught products out of international shipping lanes.

The legal status of a port State's notification of IUU fishing is implicitly stipulated under the AFS Article 3.6, whereby the subsidizing Member "shall *give due regard to* the information received and take such actions in respect of its subsidies *as it deems appropriate*". The lenient terms imply a due diligence obligation of the subsidizing State to take account of, but not to totally adhere to, the port State's post-inspection decisions when considering responsive prohibition of subsidies. Hence, the port State's authority is less decisive than that of flag, coastal States and RFMO/As whose IUU determinations, when counterbalanced by factual and procedural prerequisites, could trigger an outright prohibitive obligation on the part of the subsidizing State. In consequence, a secondary function assigned to port State measures fails to tackle two prominent causes contributing to IUU fishing. First, the primary States of origin have not always discharged the obligation to hold IUU fishers accountable to the rule of law in good faith. And second, certain at-sea IUU

movements, e.g., on-board processing and illicit transhipment, cannot be readily unearthed until the fish catches requiring landing are subject to a closer border inspection.

In fact, the port State enjoys an expansive authorization under the PSMA to alert and react to IUU fishing in inclusive manners, including: (1) illegal fishing in contravention of applicable State of origin rules; (2) unreported or misreported catches identified from each entry inspection; and (3) unregulated fishing on the high seas. In all possible scenarios, when handicapped by an evasive state of primary state jurisdiction, the port State's investigation may constitute the only realistic breaking point at which the opaque origin or secretive traces of IUU harvests cannot hide but transpire publicly. It is the very reason why the PSMA was specifically negotiated to turn the landing point into a crucial chokepoint, to deter the access of illegal fish supplies to as many transit and servicing hubs as possible in the world.

Moreover, the port State's enforcement jurisdiction is not confined to denial of port entry and services. It "may allow entry into its ports of a vessel [. . .] exclusively for the purpose of inspecting it and taking other appropriate actions in conformity with international law" under the PSMA Article 9.5. The enclosure of fishing vessels within a national port has bolstered the opinion that the port authorities "can better exercise investigative powers [. . .] by collecting documentary evidence and inspecting the vessel, in order to establish the quantity and quality of the fish catch and the fishing gear that has been used to take it" [21]. It follows that the port State should not be prevented from establishing a prescriptive jurisdiction on certain violating conduct, such as certificate falsification and data misreporting, and taking "other appropriate actions", such as vessel blacklisting and administrative sanctions, which are firmly grounded on its territorial sovereignty. Albeit "in a residual character" [21], proactive port regulation and enforcement action is arguably indispensable to fill the accidental jurisdictional void left by non-cooperative States of origin and to waste no time in triggering the multilateral subsidy ban.

4.4. Market State Jurisdiction over the Trade of IUU Fish

The recognition of a market State's fisheries jurisdiction emerges formally under the 2001 IPOA-IUU as part of its integrated approach to address IUU fishing. Similar to the rationale for port State jurisdiction, the market State's legal entitlement to controlling the commercial footprints associated with IUU traded seafood, including importation, processing, storage, transportation, distribution, marketing and consumption, is premised on its territorial sovereignty over the internal market. The market jurisdiction has been broadly interpreted as the right and duty to take measures to "ensure that their importers, transshippers, buyers, consumers, equipment suppliers, bankers, insurers, other services suppliers and the public are aware of the detrimental effects of doing business with vessels identified as engaged in IUU fishing" under the IPOA-IUU paragraph 63. On the specific instrument of application, market State measures encompass unilateral and, preferably, multilateral trade-related measures adopted by RFMO/As. Paragraph 67 makes it clear that market measures should be "transparent, based on scientific evidence, where applicable, and are in accordance with internationally agreed rules", including those administered by the WTO.

In the present day, the unilateral paradigm of market State measures to curb the infiltration of IUU fish into commerce is led by: (1) the 2008 EU IUU Regulation and subsequent implementation rules to authorize the customs authorities of EU Member States to detect and trace the movement of IUU fish from unloading through to the local retail stage [43]; and (2) the 2016 United States (US) Seafood Import Monitoring Program to collect fisheries data through the implementation of centralized electronic reporting and recordkeeping obligations on local seafood importers [44]. With respect to IUU determinations, the EU regulation administers an inter-governmental catch documentation scheme to identify individual vessels engaged in IUU fishing and, through a Union-wide carding process (green, amber and red), publicize their supportive flag States. IUU vessels are also automatically imported from the blacklists maintained by RFMOs to which the EU is a

party [45]. In a different vein, the enforcement of the US statute is capable of screening out wild-caught fish implicated in IUU practices or seafood fraud through a single-window online reporting and verification portal. Besides, foreign flag States and entities responsible for vessels engaged in IUU fishing activities have been updated in biennial reports to the US Congress since 2009 [46]. The exercise of market State jurisdiction on IUU fishing embodies a proactive complement to that of the States of origin. Such autonomous rulemaking and enforcement power is endorsed by paragraph 73 of the IPOA-IUU, acknowledging that unilateral "measures could include, to the extent possible under national law, legislation that makes it a violation to conduct such business or to trade in fish or fish products derived from IUU fishing", where unilateral IUU identification is "made in a fair, transparent and non-discriminatory manner".

The AFS, nonetheless, creates no definite legal space to absorb and apply the concept of market State jurisdiction. Firstly, apart from direct fishing, fishing-related activities are restricted to at-sea preparation and transhipment of fish that "have not been previously landed at a port" under Article 2(c). In consequence, a wide variety of illegal operations that occur within the territorial jurisdiction of the market State, such as mislabelling and misrepresentation of species names [47,48], are *a priori* excluded. Built upon the IUU definition though, the subsidy agreement has considerably trailed behind the IPOA-IUU in raising global awareness of a complementary yet valuable whistle-blower role of market States, which have a more direct bearing on various post-harvest events.

Secondly, fish importing countries are not explicitly encouraged to contribute to IUU whistleblowing on as widely a basis as possible under the multilateral notification and transparency mechanism. Unlike the procedural right ascribed to the port State, the market State is not authorized to instantly notify the relevant subsidizing State when it has clear grounds to believe that certain imported seafood has originated from illicit sources or undergone illicit processing and transaction. Although the market State has the option to provide a list of IUU vessels and operators identified under its national law to the Committee on Fisheries Subsidies, such summative document is solicited on an annual basis but not immediately after each inspection. Nor is there a sure consultative compromise guaranteed from an internal process of political and legal deliberations among interested member States.

And thirdly, the exceptional nature of unilateral market State jurisdiction is explicitly cautioned under the IPOA-IUU paragraph 66 in the meaning that it "should only be used in exceptional circumstances, where other measures have proven unsuccessful [. . .] and only after prior consultation with interested States". This reflects the entrenched division in legal opinions about the "extraterritorial" effects of restrictive importation measures, which can indirectly impose stringent "how-produced standards", such as the use of turtle-excluding devices on board [49], upon foreign fishers operating beyond the market territory. In this respect, it is prudent to say that environmentally oriented unilateral market measures do not necessarily stand as the opposite of multilateralism. As testified by the compliance measures taken by fish importing countries to successfully fulfil their WTO obligations [49], there is strong promise for transparent, non-discriminatory and scientifically based market State measures to catalyse policy alignment on how to discover IUU fish from the lower links of a supply chain and to activate the multilateral subsidy prohibition in time.

5. Conclusions

The multi-jurisdictional paradigm in international fisheries law brings forth a multitude of jurisdictional pluralism and compatibility inquiries into the capabilities of the WTO to reconcile conflicting positions, adjudicate cross-cutting disputes and ultimately enforce the prohibition of illegal fisheries subsidies. So far, it remains an untested empirical question whether the WTO can simply turn a blind eye to such inquiries, in the hope that Member States will bring to it pure subsidy claims in the future [32]. To precisely detect any jurisdictional crux, e.g., inactive, concurrent or contradictory, and to thoroughly address them is far easier said than done by a multilateral trade institution alone. From a pragmatic

standpoint, it is understandable for the negotiators to fast-track a binding agreement upon the existing division and allocation of fisheries jurisdiction in international fisheries law. Yet, at the juncture of resolving jurisdictional conflicts or vacuum, as elaborated above, there lied essentially ad hoc and periodical notification and consultation mechanisms. The procedural safeguards provided by the WTO appear to be participatory and transparent, creating an instructional atmosphere for governments to exchange information and opinions in order to yield compromised outcomes. However, in many aspects, the WTO has envisioned itself as the sole lead agency on the mediation between sensitive trade and fisheries issues. A "fear of authority integration" of UNCLOS, FAO and RMFO/A expertise is at odds with the hybrid nature of fisheries subsidies at issue [8], and the principal environmental motivation which has driven the formulation of tailor-made subsidy rules so far [50].

At the next stage, there might still be the need to evolve the interim agreement and its proceduralist benchmark to keep up with the development of innovative rulemaking, and states' and RFMO/As' precautionary actions, which together point to the imperative of establishing seamless and full-chain legal accountability for IUU fish trade. A generalization of its centrepiece indicates that the AFS has constructed, almost exclusively, a normative and evidential assessment of the upper links of a seafood supply chain, ranging from the point of capture, through transportation and transhipment on the oceans, to stop at international border entry. To comprehensively eliminate IUU-supportive fisheries subsidies, there is much to be done from a whole-chain and whole-of-society perspective. In summary, the study ends by providing three critical sets of policy advice for the WTO and its Member States to speculate and debate in the next deliberation round:

Firstly, the gap-filling role of port and market-based anti-IUU measures, which are equipped with common or comparable functionalities against the entry of IUU traded seafood [51], deserves a higher level of normative recognition. Otherwise, somehow counterintuitively, the AFS toolset may end up the most distant from a core innovation of the WTO governance, which legitimates sound border and market jurisdictions to ameliorate common environmental challenges.

Secondly, the unfounded legal and political presumption against the viability of non-product-related PPMs measures also ought to be objectively re-assessed. When conservationist pioneers take the initiative to confront and penalize IUU fishing increasingly from downstream sectors, it deserves exploring to what extent and in what form their responsible action has the potential to more than complement the inactive or incompetent jurisdiction of other fishing States of origin.

And finally, the negotiators to broaden fisheries subsidies norms in the next four years are advised to harbour a more prudent attitude towards forum shopping behaviours of Member States, if normative alignment between trade and fisheries is beyond reach in the near term. In the meantime, the WTO can strengthen intellectual partnerships with other steadfast supporters of sustainable fisheries, including the FAO, RFMOs, industrial and civil society stakeholders alike. Transparency and inclusiveness should be placed at the centre of a global strategy to evolve incremental legal commitments into full assessment and due diligence of seafood supply chains.

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