

The WTO Agreement on Fisheries Subsidies: An Impactful Breakthrough or a Message Bottle Lost at Sea?

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Abstract

The WTO Agreement on Fisheries Subsidies (AFS), adopted at the 12th Ministerial Conference in 2022, marks a significant step toward ocean protection by aiming to regulate harmful subsidies that deplete fish stocks. While it represents progress in using trade law for environmental goals, it falls short of ensuring sustainable marine resource management. This article first compares the AFS with UNCLOS) and the UNFSA) to assess legal alignment and shared principles, then evaluates the AFS through the lens of Third World Approaches to International Law (TWAIL), concluding with recent developments from the 13th Ministerial Conference. This article contends that, although the AFS promotes environmental goals, it simultaneously reinforces the colonial asymmetries embedded in the WTO's normative framework.

A. Statement of the Problem and Contextualization

"The WTO AFS [adopted at the 12th Ministerial Conference on 17 June 2022] marks a major milestone for ocean sustainability by prohibiting harmful fisheries subsidies, a key factor in the widespread depredation of the world's fish stocks. [...] The Agreement represents an historical achievement".¹ This is how the World Trade Organization (WTO) *Agreement on Fisheries Subsidies* (AFS),² widely acclaimed as a breakthrough in the progress for a more sustainable management of ocean resources, was described. Indeed, the growing problem of fish stock depletion linked to overfishing is attracting increasing attention from the international community and is seen as a major threat not only to nature but also to human survival and well-being.³ If there is no single solution to tackle the situation, a consensus has nevertheless formed regarding the harmful impact of "large-scale government support for the fishing industry"⁴ which "contributes by subsidizing overcapacity and eventually overfishing"⁵ as "several studies have indicated that the fishing industry is a subsidy-intensive sector, with the subsidy amount estimated roughly at around 30-40% of the global value of fishery catches"⁶. While the issue of subsidies came back into the spotlight in June 2022 with the adoption of the AFS, its history dates to the late 1990s.⁷ Indeed, since 1995, subsidies have

1 WTO, 'The WTO Agreement on Fisheries Subsidies' (2022), 1, available at WTO | Agreement on Fisheries Subsidies (last visited 5 May 2024) [WTO, 'Agreement on Fisheries Subsidies'].

2 *Agreement on Fisheries Subsidies* (AFS), WT/MIN(22)/33 WT/L/1144, 22 July 2022, (available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/33.pdf&Open=True> (last visited 5 May 2024).

3 FAO, 'The State of World Fisheries and Aquaculture 2022. Towards Blue Transformation' (2022), xvi, available at <https://doi.org/10.4060/cc0461en> (last consulted on 5 May 2024); For further analysis, see Sustainable fisheries | WWF (last visited 25 March 2026).

4 F. Scholaert, 'WTO Agreement on Fisheries' (2022), 2, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698842/EPRS_BRI\(2021\)698842_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698842/EPRS_BRI(2021)698842_EN.pdf) (last visited 5 May 2024).

5 *Ibid.*, 2.

6 *Ibid.*, 2.

7 *Ibid.*, 1.

been regulated by the WTO *Agreement on Subsidies and Countervailing Measures*⁸ (SCM Agreement).⁹ Unlike the AFS, however, this first international instrument did not focus on the environmental effects of subsidies but only on their negative impact on trade (trade distortions).¹⁰ If the AFS is thus at first sight considered "an historic achievement"¹¹, our aim in this article is to assess its relevance and potential tangible impact in favor of a more sustainable management of ocean resources through the regulation of subsidies granted in the fisheries sector. Our thesis is that the AFS, though presented as an historic change, is still deeply rooted in colonial narratives, influenced by the similarly biased dynamics underlying current international law. Despite the advances that it proposes, the AFS cannot, in our opinion, be considered as the long-awaited tool needed to protect ocean resources. To demonstrate this, we have adopted a two-step method: a descriptive analysis followed by an evaluative one. Those two phases are complementary and both offer an enriching perspective to answer our research question. Our method will thus include a cross-comparison analysis between the *United Nations Convention on the Law of the Sea*¹² (UNCLOS), the 1995 *UN Fish Stocks Agreement*¹³ (UNFSA), and the AFS, which will secondly be mobilized in an evaluative analysis of the AFS through the legal criterion of the TWAIL movement. Regarding the structure of this research, we will begin with a presentation of the legal instrument that is the AFS, pointing out some of its strengths and weaknesses in a pre-

8 *Agreement on Subsidies and Countervailing Measures* (SCM Agreement), 15 April 1994, available at https://www.wto.org/english/docs_e/legal_e/scm_e.htm (last visited 5 May 2024).

9 *Ibid.*, 1.

10 *Ibid.*, 1.

11 WTO, 'Agreement on Fisheries Subsidies', *supra* note 1: "The Agreement represents a historic achievement for the membership as the first WTO agreement to focus on the environment, the first broad, binding, multilateral agreement on ocean sustainability, and only the second multilateral agreement reached at the WTO since its inception" (emphasis added by the author).

12 *United Nations Convention on the Law of the Sea* (UNCLOS), 10 December 1982, 1833 U.N.T.S. 397.

13 *Agreement for the Implementation of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (UNFSA), UN Doc. A/CONF.164/37, 4 December 1995.

liminary literature review. After explaining our methodology, we will operate a descriptive and comparative analysis by comparing the UNCLOS, the UNFSA, and the AFS to highlight their conformity one to the other and to underline their common principles. Afterwards, research will be shared on the TWAIL movement and its characteristics that will enable us to carry out our evaluative analysis of the AFS in light of this movement's tenets and criteria. We will conclude with a brief overview of current evolutions relating to the AFS at the 13th Ministerial Conference and with an answer to our research question, ending with an open perspective.

B. Presentation of the AFS and Preliminary Literary Review

First, we must briefly present the AFS and some of its strengths and criticisms, which are not necessarily linked to the TWAIL movement. We have paid particular attention to highlighting the points of criticism made by the players of the sector themselves.

The AFS is an agreement that embodies the concrete materialization of the United Nations Sustainable Development Goal (SDG) 14.6 and responds to issues that have been at the heart of international debates for many years, namely the impact of subsidies on overfishing and the depletion of ocean resources.¹⁴ Indeed, in 2015, when SDG 14.6 was adopted,¹⁵ "one third of the world's fish populations [was] already overfished"¹⁶. The AFS negotiations were initiated during the 2001 Doha Round and then delayed by the Covid-19 pandemic.¹⁷ The doctrine is unanimous as to the peculiar conciliative nature of the AFS, which was able to combine both "advocacy concerns"¹⁸ and "technical concerns"¹⁹ by

14 P. Resich, 'A Global Deal to Tackle Harmful Fisheries Subsidies: A Look Behind the Scenes' (2023), available at <https://www.iisd.org/articles/success-story/fisheries-subsidies-deal-behind-scenes> (last visited 5 May 2024).

15 *Transforming our World: the 2030 Agenda for Sustainable Development*, UN Res. A/RES/70/1, 25 September 2015.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

reuniting distinct interest groups such as NGOs (see, for example, the Stop Funding Overfishing campaign).²⁰ As underlined by the doctrine, "Subsidies-financial transfers from public entities to benefit private actors are important for national policy but have the potential to distort markets and contribute to unfair trade practices"²¹. In this respect, the importance of the AFS should not be overlooked, as the concrete effects it could have would not solely be limited to the realization of SDG 14.6 as such²² but have a broader scope. Indeed, SDG 14.6 must be considered in conjunction with the other goals set by the UN, such as SDGs 1, 2, and 8.²³ They are all intertwined and an agreement on SDG 14.6 is therefore crucial to the achievement of the other goals. It is also for this reason that the AFS is welcomed generally as a memorable "binding multilateral commitment to improving ocean equity and sustainability"²⁴. In the same vein, many also point out that this is "the first WTO treaty to recognize that a specific trade policy instrument can have adverse consequences for the global commons but that may also be used to address the causes of overfishing"²⁵. It is also notable for the fact that it "entails a recognition that cross-border policy spillovers of subsidies that support illegal, unregulated, and unreported fishing extend beyond economic (competitive) concerns"²⁶. In this way, it fills the gaps left by the aforementioned SCM Agreement.²⁷

19 *Ibid.*

20 For more information, see Stop Funding Overfishing | Stop Harmful Fisheries Subsidies (last visited 5 May 2024).

21 A. M. 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, 1, available at <https://doi.org/10.1016/j.marpol.2020.103970> (last visited 5 May 2024) [Cisneros-Montemayor *et al.*, 'Fisheries Subsidies Reform'].

22 *Ibid.*, 1.

23 U.N., 'The 17 Goals', available at THE 17 GOALS | Sustainable Development (last visited 25 March 2026) [U.N., 'The 17 Goals'].

24 Cisneros-Montemayor *et al.*, 'Fisheries Subsidies Reform', *supra* note 21, 2.

25 B. M. Hoekman, P. C. Mavroidis & S. Sasmal, 'Managing Externalities in the WTO: the Agreement on Fisheries Subsidies', 26 *Journal of International Economic Law* (2023), 2, 266, 267, available at <https://doi.org/10.1093/jiel/jgad008> (last visited 5 May 2024).

26 *Ibid.*, 267.

27 J. Alger *et al.*, 'What Would Article 5.1 of the 2022 WTO Ministerial Agreement on Fisheries Subsidies Accomplish?', 153 *Marine Policy* (2023), 105641, 1, available at <https://doi.org/10.1016/j.marpol.2023.105641> (last visited 5 May 2024).

However, while the AFS is acclaimed as the long-awaited outcome after years of intensive negotiations, doctrine writers and other industry players point to some of its shortcomings, calling for its adaptation or the adoption of new instruments to address them. These criticisms regard, on the one hand, the underlying adoption dynamics of the AFS and, on the other hand, the substantial content of the AFS. These issues have nevertheless not been addressed during the 13th Ministerial Conference which was supposed to make amendments to the AFS with a view to finalizing it, which would have attracted the ratifications necessary for it to come into force (see *infra*, Chapter VI). Regarding the content issues of the AFS, we have also developed them in light of the TWAIL movement (see Chapter V).

It is important to note that criticism concerning the context in which the AFS was adopted can be linked to the weaknesses of the SDGs themselves. Indeed, Haas, who is associated with the TWAIL movement points out that the SDGs emanate solely from "Western ideas"²⁸ and that "the lack of recognition of traditional and Indigenous knowledge and the emphasis on scientific knowledge ignores alternative management forms, which are supporting more sustainable and equitable oceans"²⁹. Second, criticisms regarding the AFS content were raised by several authors. Indeed, the AFS prohibits "subsidies that support illegal, unregulated, or unreported fishing activities and contribute to the unsustainable depletion of marine resources"³⁰: ambitious objectives that have been anticipated since 2001. Nevertheless, despite an openly positive reception, authors as well as industry experts, point to the AFS's shortcomings in terms of substance. Regarding the very foundations of its targets, Hoekman et al highlight that the definition of subsidies "and the approach taken to ensure transparency"³¹ has not evolved sufficiently³² in relation to what was set out in the UNFSA. One industry player in particular, the International Collective in Support of Fishworkers (ICSF), also

28 B. Haas, 'Achieving SDG 14 in an Equitable and Just way', 23 *International Environmental Agreements: Politics, Law and Economics* (2023), 2, 199, 201, available at <https://doi.org/10.1007/s10784-023-09603-z> (last visited 5 May 2024).

29 *Ibid.*, 201.

30 Hoekman, Mavroidis & Sasmal, *supra* note 25, 266.

31 *Ibid.*, 266.

32 *Ibid.*, 267.

criticizes the substance of the AFS.³³ Indeed, it underlines the important fact that, in analyzing the three pillars of subsidy prohibition in the AFS, only "pillars 1 and 2 are proposed to be firmly dealt with"³⁴. Pillars 1 and 2, to which the ICSF refers, are "subsidies to illegal, unreported and unregulated (IUU) fishing"³⁵, which are the subject of Article 3 of the AFS.

The third pillar, covered by Article 4 of the AFS, is less regulated than the first two. Indeed, this one, which concerns "overfished stocks"³⁶, is less tightly controlled. In particular, a State may derogate from the prohibition "if [it] demonstrates effective fisheries management measures to maintain fish stocks at a healthy level in areas under its jurisdiction"³⁷. In view of the prevalent problems of overfishing, this difference is alarming and the AFS remains vague. The ICSF also points out that, while the AFS is right to make special and differential treatment (SDT) provisions for developing countries, the two-year deadline proposed for them to comply with the new requirements is not long enough.³⁸ According to the ICSF, "the complexity and lack of coherence of IUU fishing, particularly in developing countries with long coastlines and multiple jurisdictions, demand more time than a biennium to phase out subsidies to this pillar"³⁹. Additionally, the SDT provisions regarding this third pillar include "a seven-year exemption period from action to grant or maintain these subsidies to all vessels and operators within the EEZ"⁴⁰. The ICSF points out that such an exemption should not be a possibility because it could lead to a permanent impunity and harm caused to artisanal fishers and the deterioration of an already very serious environmental situation. In terms of content, other authors point out that the AFS is flawed in that it doesn't entail any provision regarding, for example, forced labor, which is

33 International Collective in Support of Fishworkers (ICSF), 'A Review of the Draft Agreement on Fisheries Subsidies (WT/MIN (22)/W/20' (2022), 1-2, available at A Review of the Draft Agreement on Fisheries Subsidies (WT/MIN (22)/W/20), 13 June 2022 by ICSF – ICSF (last visited 5 May 2024).

34 *Ibid.*, 1.

35 *Ibid.*, 1.

36 *Ibid.*, 1.

37 *Ibid.*, 1.

38 *Ibid.*, 1.

39 *Ibid.*, 1.

40 *Ibid.*, 1.

extremely widespread in the fishing industry, or for genuine enforcement mechanisms ("blanket provision" – Article 5 of the AFS).⁴¹ This lack of specific provisions on working conditions in the fishing industry was brought forward by United States negotiators at MC13.⁴² However, their efforts came to no avail in view of the failure of the AFS at MC13 (see Chapter VI).

C. Methodological Features of This Research

To assess the real impact of the AFS, we will compare it with the UNCLOS and with the 1995 UN Fish Stock Agreement⁴³ as a first step, cross-referencing the relevant articles of these different instruments. Indeed, the issues of overfishing and the depletion of fish stocks are crucial from both a food security and a climate perspective. To address these concerns, several measures have been adopted at the international level over the last few decades. The first instrument was the UNCLOS in 1982, called the "Constitution of the Oceans"⁴⁴ and which, for the first time, contained provisions for the conservation and management of ocean resources. In 1995, the UNFSA was adopted to implement the provisions of the UNCLOS. These instruments already represent significant advances and are tangible evidence of the international community's concern for protecting fish stocks through sustainable management. It was this focus and, more generally, the international community's growing awareness of pressing climate issues that led to the adoption of the Sustainable Development Goals (SDGs) by the United Nations General Assembly in 2015⁴⁵ (UNGA Resolution). Replacing the Mil-

41 J. E. Becerra Sanchez, 'The Present and Future of the 2022 WTO Agreement on Fisheries Subsidies', 55 *New York University Journal of International Law & Politics* (2022), 1, 165, 174, 175, available at <https://www.nyujilp.org/wp-content/uploads/2023/03/Comment1.pdf> (last visited 5 May 2024).

42 T. Denamiel, M. Schleich & W. A. Reinsch, 'Insight Into the 13th WTO Ministerial Conference' (2024), available at <https://www.csis.org/analysis/insight-13th-wto-ministerial-conference> (last visited 5 May 2024).

43 UNFSA, *supra* note 13.

44 T. Treves, 'Introductory Note on the United Nations Convention on the Law of the Sea' (2008), 1, available at United Nations Convention on the Law of the Sea - Main Page (last visited 5 May 2024).

45 U.N., 'The 17 Goals', *supra* note 23.

lennium Development Goals,⁴⁶ they aim to establish a common framework for action with sustainability as the foremost priority.⁴⁷ The SDGs cover a wide range of issues and challenges, including health, access to drinking water, and education. They also inherently have an interconnected nature.⁴⁸ SDG 14 is of particular interest to our study, more specifically Target 14.6 as its aim is to:

"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"⁴⁹.

The adoption of these SDGs has also had the effect of reinvigorating the WTO negotiations on fisheries subsidies.⁵⁰ To make this target a reality, the WTO adopted the AFS on 17th June 2022, which must be analyzed considering the objectives and provisions of these pre-existing instruments (the UNCLOS and the UNFSA). The AFS's conformity to these previous instruments must therefore be assessed. Indeed, the priorities of sustainable management, conservation, and the development of fish stocks were already present in these previous instruments and inspired the definition of the SDGs' objectives in 2015. There is thus a common thread running through all these different acts of the international community in pursuit of a better future for the planet. In short, the UNCLOS gave rise to the UNFSA and to the SDGs, and Target 14.6, which was followed by the adoption of the AFS in 2022.

To analyze the AFS in light of the UNCLOS and the UNFSA with a descriptive research objective, we have developed several methodological features that will help structure our research. Indeed, for each relevant objective and provi-

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

49 UN A/RES/70/1, *supra* note 15, 24.

50 Sanchez, *supra* note 41, 169.

sion of these two instruments preceding the AFS, we will carry out a comparison with regard to the latter, to understand whether the provisions of these different instruments are *compatible*, *complementary*, *supplementary* or *contradictory*. These four keywords will act as prisms through which to assess our analysis. In a second step, we will mobilize the TWAIL movement for an evaluative analysis of the AFS. To that end, we have identified certain tenets and features of this movement as legal criteria by which to examine the principles and articles highlighted in the first descriptive phase of the study. In view of the WTO's criticism of its lack of "efficient" inclusion of developing countries, and their predominant role in the fishing industry, it seemed that the TWAIL movement was the most significant for an evaluation of the AFS. Each element examined will therefore follow this sequence of analysis: description, cross-referencing with the AFS or the other instruments mentioned, and evaluation using the TWAIL lens. In the concluding section, this approach will enable us to offer a global critique of the AFS, answering our research question: is the AFS an impactful breakthrough or a message bottle lost at sea?

D. Descriptive and Comparative Analysis of the AFS

I. Comparative Analysis of UNCLOS in Light of the AFS

1. The Objectives of UNCLOS in Light of the AFS: the UNCLOS Preamble⁵¹

UNCLOS was adopted in a particular historical and political context, with underlying dynamics inspired by a desire for international regulation and the creation of a solid framework on which to base future acts of implementation. These concerns have thus shaped the objectives of the UNCLOS as spelled out in its preamble.⁵² The objectives to be highlighted in relation to the present analysis are particularly those that can be linked to the recent formulation of SDG 14,

51 All quotations in this paragraph are drawn from the preamble to UNCLOS.

52 UNCLOS, *supra* note 12.

whose three essential focuses are the reduction of marine pollution, the protection of marine biodiversity, and the prohibition of certain types of overfishing and fisheries. In this light, the most notable ambitions of this international instrument are, firstly, to establish "a legal order for the seas and oceans which [...] will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment". Secondly, this legal order must be implemented "in a spirit of mutual understanding and cooperation" to achieve the "realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries". It is through these priorities, visions, and aspirations that UNCLOS' objectives can be linked to those of SDG 14.6. Linked to this latter, the AFS gives concrete expression to SDG 14.6, which is directly inspired by the need for better management of ocean resources. Those instruments, in that sense, are thus *complementary* because they aim for the same ambitions, even if via a diversity of tools.

2. The UNCLOS Articles in Light of the AFS

The relevant provisions of the UNCLOS to cross-reference with the AFS appear to be Articles 61 to 63, which deal with the management of fisheries by States within their exclusive economic zone. These three articles are indeed *complementary* and their common inspiration concerns the conservation and development of fish stocks, notably through collaboration between States. On the one hand, Article 61 concerns the "conservation of the living resources" by the coastal State, notably by combating overexploitation and adopting measures to restore harvested species when necessary. The coastal State is responsible for "determining the allowable catch of the living resources in its exclusive economic zone". Article 62 requires the coastal State to "promote the objective of optimum utilization of the living resources" in its exclusive economic zone. The State may also grant access to resources to other States, for example when it does not have the capacity to "harvest the entire allowable catch" itself. Article 63, on the other hand, concerns "Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it" and stresses the need for cooperation between States to ensure

"the conservation and development" of fish stocks affected by this transboundary situation. The common concern of these articles is the determination of the allowable catch and its sustainable management. This theme can be linked to Article 3 of the AFS, which prohibits "subsidies contributing to illegal, unreported and unregulated fishing". Indeed, one of the aims of the AFS is to ensure that fishing is legal and regulated through the determination by coastal States of the allowable catch and the implementation of measures and systems of cooperation between States for its responsible management. It would be *contradictory* to advocate these measures in the UNCLOS without in parallel prohibiting the granting of deleterious subsidies. Article 3 of the AFS therefore provides for a prohibition that is *complementary* to the obligations that are incumbent upon coastal States under the UNCLOS. While Article 3 of the AFS focuses on illegal and unregulated fishing, Article 4 refers to the prohibition of "subsidies regarding overfished stocks". This article takes up a concern that runs through Articles 61 and 63, namely the responsible management of fish stocks and the "optimal use" of these resources to counter the risks of stock depletion. We should also note the central role played by the coastal State in recognizing that a species must be considered overfished (Article 4.2 of the AFS) and in granting or maintaining subsidies for the purpose of reconstituting "stocks to a biologically sustainable level". We can therefore consider these provisions to be *complementary*: the UNCLOS sets out precise objectives in terms of determining allowable catches and optimal stock management, while the AFS – driven by the same desire and aspiration – reinforces these ambitions and their impact by prohibiting certain types of subsidies. We will criticize these in the section devoted to reviewing the precautionary approach that States must adopt (see Chapter V, letter C, point (i)). On the other hand, Article 61.3 as well as Articles 62.2-3 expressly mention the special needs of developing countries. Particular attention is thus paid to developing countries, which are also covered by the two situations described in Articles 69 and 70. As can be seen from these, UNCLOS is genuinely concerned with the special situation of developing countries. This concern is then reflected in the AFS, both in its preamble and in several of its articles (see, for example, Articles 3 to 7). We will criticize these provisions and the way in which developing countries are included in the AFS (see Chapter E, point III, point 3).

II. Comparative Analysis of the UNFSA in Light of the AFS

1. The Objectives of the UNFSA in Light of the AFS

The objective of the UNFSA is enshrined in its Article 2, which specifically sets out the objective of executing and implementing the provisions of the UNCLOS analyzed above. The AFS can be linked to these objectives by its Articles 3 and 4. Indeed, to ensure "the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation", it is necessary to act through coherent measures such as those proposed by the AFS concerning the prohibition of certain subsidies. The aim of the AFS is therefore similar in that it aspires to ensure, ultimately, more responsible management of ocean resources via the specific means of prohibiting certain subsidies. A parallel can be drawn with Articles 61 to 63 of the UNCLOS, which also aimed to achieve sustainable management of marine resources. All this is reminiscent of SDG 14 and its objectives. So, in terms of ambitions, there is a common thread running through all these different instruments in that they appear to be complementary to each other.

2. UNFSA in Light of the AFS

The articles that seem most relevant to us for cross-referencing with those of the AFS are Articles 5 to 8 of the UNFSA, which are to be found in Parts I and II of this instrument. Firstly, Article 5 sets out the general principles that States must follow. These general principles include elements already present in the UNCLOS (Article 61), such as the requirement that States base themselves "on the best scientific evidence available" when adopting measures "designed to maintain or restore stocks at levels capable of producing maximum sustainable yield" (Article 5, b). This article also enshrines the obligation for States to adopt a "precautionary approach" when acting (Article 5, c). In short, this article evokes the obligations already contained in the UNCLOS, with a particular focus on the effects of fishing (Article 5(h)). Let's also note Article 5(i), which can be directly linked to the concern of these instruments for developing countries: indeed, this

point indicates that States must "take into account the interests of artisanal and subsistence fishers" in their action to "conserve and manage straddling fish stocks and highly migratory fish stocks" and "in giving effect to their duty to cooperate in accordance with the Convention". The link between this article and the AFS is obvious in that the latter's aim – behind its prohibition of certain subsidies – is to combat "the widespread depredation of the world's fish stocks". This is a motive for the preservation and better management of natural resources, which is the inspiration behind Article 5 of the UNFSA. However, there is a difference in scope between the UNFSA and the AFS: the UNFSA specifically targets straddling and highly migratory fish stocks, as detailed in the UNCLOS. The AFS, on the other hand, is not only concerned with straddling and highly migratory stocks, but has a broader scope.

Given the crucial role that subsidies play in the overfishing phenomena, it is clear that the conservation and responsible management of marine resources must include a ban on such subsidies, which reinforce overfishing. We therefore conclude that, to achieve a common goal of better management of marine resources, these two instruments and articles are complementary, although their precise scope differs. Another difference between these two instruments is the way in which this aim of conservation and responsible management is achieved. Indeed, Article 5 advocates the implementation by States of management, surveillance, and cooperation measures while the AFS focuses on the prohibition of subsidies that endanger fish stocks. However, despite these differences in scope and the concrete means of achieving their common objective, it can be considered that these general principles detailed in Article 5 of the UNFSA and the AFS are complementary, as both aim at the same goal. Secondly, Article 6 lays down the obligation for States to apply a "precautionary approach"⁵³ (Article 6, 1). Again, as in Article 5, this is a specific technique aimed at protecting straddling and highly migratory fish stocks. This approach should guide the actions of States in achieving

53 This obligation was already present in Art. 61 of the UNCLOS, but here an additional nuance has been added, specifying that "The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures" (Art. 6, 2). This is a clear illustration of the practical implementation of the requirements contained in the UNCLOS, since these are concrete and precise provisions offering clear guidelines to States.

the objective of conservation and responsible management of marine resources. Although the AFS does not provide for a technique explicitly based on the precautionary approach as such, it should be emphasized that Article 4.2 requires recognition that a fish is overfished "by the coastal Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A in areas and for species under its competence, *based on best scientific evidence available to it*" (emphasis added). The logic is thus similar and rests upon a scientific appreciation. Regarding Article 7, it focuses on the compatibility of measures adopted on the basis of the UNFSA with other measures, such as those adopted on the basis of Article 61 of the UNCLOS (Article 7, §2, a). The UNFSA is also interesting for its Part III, which details the "mechanisms for international cooperation concerning straddling fish stocks and highly migratory fish stocks"⁵⁴ between coastal States and States fishing on the high seas. The following paragraphs of the article set out the possibility of creating "subregional or regional fisheries management organizations"⁵⁵ as privileged areas for cooperation. These organizations, known as RFMO/A (Regional Fisheries Management Organization or Arrangement), play a crucial role in the practical application of the AFS. For example, a "vessel or operator [is] engaged in IUU fishing if an affirmative determination thereof is made by [...]"⁵⁶ one of these RFMO/As. This is a substantial assessment that leads to concrete results in terms of subsidy prohibition. It is therefore appreciable that the RFMO/A whose introduction is advocated in particular by the UNFSA play a key role in the application of the AFS, even though the UNFSA targets RFMO/As devoted to straddling fish stocks and highly migratory fish stocks in accordance with its scope of application, whereas the AFS targets RFMO/As generally. There is thus a link between these two instruments and the impact of RFMO/As mentioned in both. These RFMO/As are therefore key players in the day-to-day implementation of these objectives. But are they representative of the populations and communities involved in the fishing industry? Do they have sufficient links with the populations of the Third World?

54 UNFSA, *supra* note 13, Art. 7.

55 *Ibid.*

56 *Ibid.*

III. Underlying Principles Common to the UNCLOS and the UNFSA – and to the AFS?

Following our comparison and analysis, it is therefore possible to highlight the major principles common to the UNCLOS, the UNFSA, and the AFS (and relevant to our own environmental and social focuses⁵⁷). These principles are expressed in specific articles of these instruments, as well as in their preambles. For each major common principle identified, we have linked it to the AFS. The aim of this conclusion is therefore to show the extent to which the dynamics of these instruments are common (see the "concrete" principles concerning the method of achieving the final objective set out below), although each of them of course has its own particularities, notably linked to their respective scope of application. The aim is common, the means to achieve it are both similar and divergent, and the intended overarching objective is the responsible management of ocean resources.

Firstly, their aim of environmental protection – and, in particular, of marine resources – is common in that the UNCLOS and the UNFSA instruments are both inspired by a desire to better manage the sea's resources while preserving ocean ecosystems. In this respect, the AFS is in line with this principle. After all, by combating overfishing, it ultimately aims for responsible and sustainable management of the oceanic resources. It is therefore a continuation of the two previous instruments and implements them in concrete terms. To achieve this shared objective of "peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment"⁵⁸, several other more "concrete" common principles on how to implement it are set out in these instruments. Indeed, all three of the aforementioned instruments pay particular attention to cooperation between States in order to achieve this goal. We

57 Indeed, it would also have been possible to highlight the principle of national sovereignty, for example, which is also common to all three instruments. However, our particular focus in this work is on assessing whether the AFS is a tool that offers concrete avenues for improving the current situation of overfishing. For this reason, we have only developed the principles that seem most relevant in the light of this final analysis objective.

58 UNCLOS, *supra* note 12, preamble.

can deduce that a common "concrete implementation" principle is that of cooperation between States. It should also be noted that all three mention the specific needs of developing countries (see analysis and critique *infra*, Chapter V, letter C, point (iii)). Secondly, it should also be stressed that States, in their respective actions and when cooperating, must respect the precautionary approach mentioned above. They are also bound by the requirement to base themselves on up-to-date scientific data – i.e., "the best scientific information available". This obligation is contained in both the UNCLOS and the UNFSA (see in particular Article 6, "application of the precautionary approach"). Although the AFS does not provide for a technique specifically based on the precautionary approach explicitly, it should be emphasized that Article 4.2 requires recognition that a fish stock is overfished "based on best scientific evidence available to it". The logic is thus similar across these three instruments.

In conclusion, the main principle that instills a common dynamic between these three instruments is the objective of achieving sustainable management of these resources – including with regard to future generations (principle of conservation and sustainable management of marine resources). The UNCLOS and the UNFSA were born out of a growing awareness of the fragility of the oceans, and the AFS is the instrument that brings action to the realization that trade law, fishing, and overfishing have a significant impact on the environment. The AFS, which stems from the WTO, is therefore an example of the use of trade law for environmental protection purposes – to counter the environmentally destructive effects that international trade and, *in casu*, fishing can otherwise have. The principles of cooperation and precaution also bind these three instruments together, providing them with a concrete means of achieving the main objective of sustainable management of marine resources. In short, starting from the general aim of nature conservation, these instruments contain indications on the concrete solutions to be put in place to achieve this goal. Each within its own particular scope of application, they are linked by these three principles. There is thus a conformity of the AFS with regards to these two other instruments.

E. Evaluative Analysis of the AFS Through the TWAIL Lens

I. Identification of the Main Tenets of the TWAIL⁵⁹ Movement⁶⁰

Inspired by decolonization movements, TWAIL emerged as a critical and political school, and it offers a new analysis of the foundations of international law itself by arguing that this body of law serves as a perpetuator of inequalities, attributed to its colonial and oppressive roots. From the outset, it should be noted that the TWAIL movement is united by a common desire for the decolonization of international law and the empowerment of Third World populations.⁶¹ The TWAIL' aim is to increase the participation of actors from these countries in the creation of international law.⁶² By intellectually dismantling the power dynamics that plague the legacy of current international law, TWAIL endeavors to empower hitherto second-tier actors and thus break the colonial domination that is still present in the creation and practice of international law.⁶³ In this work, we have paid particular attention to using direct sources of TWAIL to better identify its main tenets and characteristics.

59 The term "Third World" is used here in alignment with TWAIL terminology to reflect the movement's historical and political framing.

60 TWAIL Review, 'Founding Statement' (2022), available at <https://twailr.com/about/founding-statement/> (last visited 5 May 2024).

61 J. T. Gathii, 'A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography', 35 *Trade Law and Development* (2011-2012) 1, 26, 27, available at <https://ssrn.com/abstract=1933766> (last visited 5 May 2024).

62 A. Anghie, 'Welcoming the TWAIL Review', 1 *TWAIL Review* (2020), 1, 2, available at <https://twailr.com/twail-review/issue-1-2020/antony-anghie-welcoming-the-twail-review/> (last visited 5 May 2024).

63 Gathii, *supra* note 61, 37.

1. First Tenet: Decolonizing International Law by Placing the Third World at the Center

The first tenet we feel important to highlight is the TWAIL movement's focus of attention for the Third World. While this movement is mobilized under several approaches, the common concern for all these thinkers is the Third World.⁶⁴ One consensus links them all: international law is the legacy of a colonial way of thinking that has historically dominated the world and continues to do so through law. Consequently, the major concern of the TWAIL movement is to decolonize international law by exposing its Western-centric sources and "decolonize the lived realities of the peoples of the Global South"⁶⁵. The TWAIL movement aims to challenge the hegemony of concepts established by the West and the legacy of domination left by colonization by placing Third World countries at the center of their analysis.⁶⁶

2. Second Tenet: Redefining the Universality of International Law

International law and the international organizations that generate some of its sources are often presented as being universal and inspired by principles that govern the entire world.⁶⁷ However, TWAIL thinkers question and refute this supposed universality of international law, highlighting the different practices and ways of thinking that present other lenses. In this respect, the WTO can be seen as an organization that creates supposedly universal sources of law, but which – if we observe the underlying dynamics – remain biased by Western domination (see Chapter V).

64 *Ibid.*, 27.

65 Anghie, *supra* note 62, 2.

66 Gathii, *supra* note 61, 35.

67 *Ibid.*, 29.

3. Third Tenet: TWAIL is an “Historically Aware Methodology”⁶⁸

For TWAIL, colonized countries have been assimilated to the conceptions of First World countries and forced to adhere to a perspective of international law that is inherently colonial, denying their own practices and concepts (for example, those of indigenous populations).⁶⁹ For this school of thought, the link between Third World countries is that they have all been subjected to colonialism from an historical point of view, which creates their unity and determination to show that another international law is possible,⁷⁰ as are concrete changes for the populations of these countries through the analysis and propagation of knowledge deciphering the imperialist origins of international law as we know it today. The TWAIL movement aims for an “historical re-examination of international law”⁷¹ by dismantling its colonial origins and perpetuating its legacy of domination.

II. Identification of Tenet-Related Criteria for Criticizing the AFS

To identify common dynamics that can be used for a precise analysis of a subject through the TWAIL prism, Mickelson has highlighted three “fundamental concerns”⁷² found in TWAIL literature. These three criteria have been drawn from an in-depth analysis of the TWAIL literature and enable us to synthesize the tenets while adding a more technical dimension to them in that they are linked to the “methods” of analysis used by the thinkers of the TWAIL movement. They are, therefore, criteria that are inspired by the movement’s fundamental tenets, helping to critique an instrument or a situation through its prism. These concerns are, firstly, “interconnectedness of subject areas, illustrated by an unwilling-

68 *Ibid.*, 34.

69 K. Mickelson, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’, 16 *Wisconsin International Law Journal* (1998), 2, 353, 355-362, available at Rhetoric and Rage: Third World Voices in International Legal Discourse by Karin Mickelson :: SSRN (last visited 5 May 2024).

70 *Ibid.*

71 Gathii, *supra* note 61, 30.

72 Mickelson, *supra* note 69, 397.

ness to draw rigid boundaries between various areas of the law (such as economics, human rights, or the environment)⁷³, secondly "an emphasis on considerations of morality, ethics and justice; in other words, an unwillingness to separate law from wider concerns or to define law in a narrow 'legalistic' fashion"⁷⁴ and, thirdly, "an emphasis on history, typified by an unwillingness to look at any problem as ahistorical or to separate the law from the historical context within which it developed"⁷⁵. *Interconnectedness, justice and history*: these are the prisms through which the TWAIL movement seeks to highlight the colonial character of our current international law. These criteria appear to be in line with the tenets of the movement identified above, in that they reflect a preoccupation with the history of Third World domination and its perpetuated reminiscences, as well as a desire to decolonize international law and to highlight the persistent logics of domination in this branch of law. Indeed, at the heart of these three criteria is the highlighting of the logic of domination underlying international law and the inequalities this creates for Third World countries. Finally, these criteria provide a technical indication of how to analyze through the prism of the TWAIL movement. In addition to these criteria, we have chosen to inspire our analysis with the questions posed by Anghie: "Can international law be used to further the interests of Third World peoples? How do we transcend Eurocentrism and create the space for different voices – voices that are desperately needed as we live in a time when it seems an entire order and a whole vocabulary are in crisis and new ideas and approaches must emerge?"⁷⁶. In our analysis, we will therefore criticize the AFS in light of these three criteria, which in our view relate to the tenets of the movement itself, and considering Anghie's question which crystallizes TWAIL's main inspiration. What is more, as far as the TWAIL movement's concern for the Third World is concerned, we have decided to dedicate a more in-depth analysis solely to what the AFS foresees with regard to developing countries. In this way, we will be able to highlight how this common concern among all TWAIL thinkers is addressed by the AFS in a particular way.

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 Anghie, *supra* note 62, 2.

III. Application of the TWAIL Criteria to the AFS

As explained above, we will apply the criteria identified in the TWAIL literature to analyze the AFS in light of them. Thus, we will examine the alignment of this instrument with the tenets of the movement by mobilizing the criteria formulated by Mickelson, which are their technical translation.

1. Universal Nature of the AFS Questioned Through the Interconnectedness⁷⁷ Criterion

Although the AFS provisions and their main ambitions of environment protection reflect global concerns, they do not really consider the differences that may exist between countries, which undermines their universal vocation. While there is a consensus on the need to address environmental change, it is necessary not to isolate this objective to derive measures that remain *in abstracto* because they do not correspond to the reality on the ground in the countries concerned. In this respect, the interconnectedness criterion of the TWAIL movement inspires us not to see the law in isolation from other branches or other realities: the AFS, in this sense, disconnects its measures from social considerations and starts from the premise of equality between States in terms, for example, of access to scientific knowledge in order to adopt an optimal precautionary approach. The AFS also ignores some of the realities of small-scale fishing in Third World countries in particular, despite the intention stated in its preamble to take account of the interests of developing countries. However, certain authors like Lennan and Switzer argue that a correct implementation of the AFS could benefit small-scale fisheries. However, as those authors note, “The AFS does not deal with all aspects of fisheries subsidies. SDG 14.6 requires States to ‘prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing’. Agreement on subsidies contributing to overca-

⁷⁷ Mickelson, *supra* note 69, 397: “[...] interconnectedness of subject areas, illustrated by an unwillingness to draw rigid boundaries between various areas of the law (such as economics, human rights, or the environment”.

capacity and overfishing proved elusive at MC12. Accordingly, while the AFS text agreed to in June 2022 contains a prohibition on subsidies granted in respect of fish stocks which are overfished, there is still work to be done on the prohibition of subsidies which, in general terms, are likely to contribute to overfishing and/or overcapacity⁷⁸. These two facets illustrate the detached – and therefore non-universal, but rather Western-centric – nature of the AFS.

With regard to the precautionary approach first of all – i.e., basing decisions on scientific evidence and data *in casu* – the technologies of each State are not equivalent and therefore neither is their access to the best possible scientific information needed to adopt the precautionary approach.⁷⁹ It should also be noted that the cost of such assessments is very high, putting developed countries in a more favorable position than developing countries when it comes to complying with this obligation.⁸⁰ Also, in the corpus of information constituting the "best scientific evidence available", no room is left for the indigenous and traditional knowledge of the fishing populations who have inhabited the areas concerned for generations. In this respect, the criterion of interconnectedness can shed light on the fact that the AFS seems to isolate the practice of States, establishing no link to areas other than law and economics. Decisions based on a scientific approach may of course be legitimate, but they erase an essential dimension of traditional knowledge. As Haas points out, both the SDGs and the AFS stem from Western-centric conceptions (for example, the emphasis on industrial fishing and a strong vertical management of issues) and leave no room for alternatives to the use of scientific data produced by people who sometimes have little sense of field practice.⁸¹ However, it is also recognized that indigenous practices of populations who have

78 M. Lennan & S. Switzer, 'Agreement on Fisheries Subsidies', 38 *The International Journal of Marine and Coastal Law* (2023), 1, 161, 161-177, available at <https://doi.org/10.1163/15718085-bja10116> (last visited 25 March 2026).

79 B. S. Chimni, 'Customary International Law: A Third World Perspective', 112 *American Journal of International Law* (2018), 1, 1, 22, available at Customary International Law: A Third World Perspective | American Journal of International Law | Cambridge Core (last consulted on 5 May 2024).

80 R. Kessler, 'Stalemate: WTO Talks Again Fail to end Overfishing Subsidies', Mongabay Environmental News (05. March 2024), available at <https://news.mongabay.com/2024/03/stalemate-wto-talks-again-fail-to-end-overfishing-subsidies/> (last consulted on 5 May 2024).

81 Haas, *supra* note 28, 201.

lived in these areas since time immemorial have beneficial effects for the environment: an example of this is the practice of forest fires practiced by First Nations for centuries, which were banned for a long time despite their salutary nature for the land.⁸² A TWAIL criticism of these provisions is that the AFS does not sufficiently link the issues, does not take a satisfactory holistic view of the situation concerned, and denies alternative forms of conservation and resource management by leaving no room for traditional knowledge and practices.

This disregard for alternative ways of knowing and indigenous practices has been repeatedly highlighted by TWAIL thinkers, following the example of Chimni, which denounces this phenomenon concerning the determination of international customary law.⁸³ It is part of colonial thinking to consider indigenous or traditional knowledge as inferior or, alternatively, to consider it as inferior because of its unwritten nature, which is often the case in indigenous communities. The historical criterion of the TWAIL movement can therefore also be mobilized here, in that the roots of this bias by which international law excludes community and indigenous knowledge must be found in colonization.⁸⁴ International law – and the AFS, in this sense – is still deeply rooted in these colonial and imperialist narratives, highlighting European and Western cultures to derive instruments that are then intended to apply elsewhere.

Furthermore, with regard to taking into account the realities of developing countries, the universal nature of the AFS can also be questioned in that it only concerns one fringe of the fisheries sector and is completely silent on small-scale fishing and fishing communities. This is an internal contradiction within the instrument: by advocating consideration of the interests and realities of developing countries, the AFS intends to include them and thus be universal. Yet the real-

82 CBC, 'How Indigenous 'Cultural Burns' can Replenish our Forests' (30 September 2021), available at <https://www.cbc.ca/news/science/what-on-earth-indigenous-fire-forests-1.6194999> (last visited 5 May 2024).

83 Chimni, *supra* note 79, 6, 35.

84 R. Mawani & S. Prange, 'Unruly Oceans: Law, Violence, and Sovereignty at Sea' (12 March 2021), available at Unruly Oceans: Law, Violence, and Sovereignty at Sea – TWAILR (last visited 5 May 2024).

ity in these countries is the importance of small-scale fishing and the struggles for survival in fishing communities, which are often endangered by the explosion of industrial fishing practices.

However, it should be emphasized that the AFS is an instrument that cannot be interpreted in isolation from the framework within which it was negotiated and adopted – namely the WTO – nor separated from the SCM Agreement on which it is based. Small-scale fisheries and fishing communities would be affected by the AFS only indirectly, such as through spillover effects, due to the financial support granted by States that would generate environmental imbalances. Nevertheless, both the WTO and the SCM Agreement have been subject to critiques from a TWAIL perspective and, to a greater or lesser extent, what is criticized in the AFS embodies the same condemnatory yoke for the WTO and the SCM Agreement. Still, it seems pertinent to highlight this interdependence between the AFS, the WTO, and the SCM Agreement, so that the critiques raised here are not read in isolation. Moreover, the phenomenon of fragmentation within the international legal order should not constitute an obstacle to a systemic critique of international law and its underlying premises. Indeed, the AFS is itself a product of this fragmentation, but it suffers from the same structural problems that characterize international trade law more broadly.

2. Using Subsidies to Protect the Environment: The Neutrality of This Choice Questioned Through the Justice⁸⁵ Criterion

It is also worth noting that, while the ban on subsidies is an obvious strategy for combating overfishing and achieving marine resource management and conservation objectives, it is necessary to examine this a priori neutral and objective measure in the light of the TWAIL criterion of justice, which advocates for an analysis of the law that takes account of moral and ethical elements. Indeed, as pointed out by Cisneros-Montemayor et al., "regarding fisher incomes, there must be distinctions between crews on large vessels and hired fishers in firms with many smaller vessels, compared to 'self-employed' artisanal and subsistence fishers"⁸⁶. This distinction is clearly lacking in the AFS, which fails to consider the spe-

85 Mickelson, *supra* note 69, 397.

cific needs of small-scale fisheries and communities in need. Despite Article 11.3, which lays out specific rules in the event of a natural disaster, nothing is said about a social emergency or a difficult economic situation.⁸⁷ To this end, Cisneros-Montemayor et al. recommend the creation of "programs [that] should still be designed with specific event, time, and geographic limits (Art. 11.3)"⁸⁸. They also advocate for the integration of fishers into financial support programs and the gradual formalization of artisanal fishing. In short, "there must be space for programs that support access to sustainably managed fisheries for rights-holders—notably including Indigenous peoples—and historically marginalized groups, and this connects well with the wider benefits of integrating fisheries and broader well-being policy".⁸⁹

Considering these elements, it is possible to draw two criticisms from the characteristics of the TWAIL movement: by taking little or no account of the specific needs of local fishing populations, the AFS positions itself as an instrument that aims to be neutral and objective and thus erases the real needs behind the fishing-dependent populations. Focusing on the medium- and large-scale fishing industry, it also has an impact on artisanal fishermen, who are not mentioned in the instrument. It is therefore a legal tool which, in our view, lacks interconnectedness as it does not link law and social and historical considerations, but also justice as it isolates from its lines and provisions necessary moral considerations such as taking account of artisanal fishermen. As McDaniel and Murtazashvili point out, "governments need to assure small-scale fishers that large foreign subsidized fleets will not be allowed to overfish in EEZs. At the same time, however, governments must make it clear that the new subsidy rules will apply to everyone, large foreign fleets and small local fishermen alike"⁹⁰. This is particularly striking

86 A. M. Cisneros-Montemayor *et al.*, 'A Constructive Critique of the World Trade Organization Draft Agreement on Harmful Fisheries Subsidies', 135 *Marine Policy*, 104872, available at A constructive critique of the World Trade Organization draft agreement on harmful fisheries subsidies - ScienceDirect (last visited 5 May 2024).

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

given that "small-scale fisheries account for 40% of the world's fish catches and the WTO agreement will only be effective if small-scale fishermen play a key role in its implementation"⁹¹.

If we take up Anghie's question "Can international law be used to further the interests of Third World peoples?"⁹², the AFS is rather unsatisfactory. As Krishnan and Gopalakrishnan point out, "while the Agreement curbs global IUU fishing and other extravagances involving ocean wealth, it has put small-scale livelihood fisheries in India and other developing countries in a difficult situation"⁹³. This factor also explains the failure of negotiations at MC13 in March 2024 (see *infra*, Chapter VI). Indeed, industrial fishing and its "significant over-capitalization by first-world fishing fleets"⁹⁴ is the cause of a major decline in marine resources and has led in its wake to waves of collapse "of local fisheries, unemployment, and loss of livelihood and food and nutritional security in less-developed countries"⁹⁵. Although the AFS intends to act on subsidies for industrial fishing, the absence of specific provisions for local fisheries, fishing communities, and traditional fishing leaves a huge gap that only serves to reinforce the already existing inequalities caused by the over-exploitation of industrial fishing.

90 C. McDaniel & I. Murtazashvili, 'Beyond Adoption: Closing the Gaps in the WTO Fisheries Subsidies Agreement' (18 December 2023), available at <https://www.mercatus.org/research/policy-briefs/beyond-adoption-closing-gaps-wto-fisheries-subsidies-agreement> (last visited 5 May 2024).

91 *Ibid.*

92 Anghie, *supra* note 62, 2.

93 M. Krishnan & B. N. Gopalakrishnan, 'Indian Fisheries in the Context of WTO Regulations' (11 December 2023), 2, available at <https://www.mercatus.org/research/policy-briefs/indian-fisheries-context-wto-regulations> (last visited 5 May 2024).

94 *Ibid.*

95 *Ibid.*

Considering these elements, it may therefore be questioned whether the AFS really takes into account the moral factors inherent in the criterion of justice⁹⁶ developed by the TWAIL movement. In our opinion, it is unethical to provide for an instrument of international law that erases a whole part of the sector's reality, a fortiori when this part is also the most vulnerable.

3. A Real Inclusion of Developing Countries by the SDTs? – The SDTs Questioned Through the Historical⁹⁷ Criterion

As mentioned above, all three instruments contain specific provisions relating to developing countries. In the case of UNCLOS, this concern is mentioned in Articles 61.3 and 62.2-3, which expressly refer to the special needs of developing countries. The UNFSA, on the other hand, has an entire section devoted to the "Requirements of developing states" (Part VII). Briefly, this part begins by acknowledging the "special requirements of developing states" before going on to detail the "forms of cooperation with developing states" and devoting "special assistance in the implementation of the Agreement", which is reminiscent of Article 7 of the AFS and has a similar technical assistance and capacity-building mechanism for developing countries. In both the UNFSA and the AFS, a Fund has been established to provide such assistance to developing countries.⁹⁸

Firstly, the presence of a "peace clause"⁹⁹ is noteworthy in Article 3.8 of the AFS. This clause prevents developing countries from being penalized for maintaining their harmful subsidies for a period of two years. This provision enables them to make a less radical transition to a more responsible fishing sector. Secondly, Article 6 of the AFS provides for "due restraint" to be exercised by States "in matters involving an LDC Member". It also requires them to take account of their

96 Mickelson, *supra* note 69, 397: "an emphasis on considerations of morality, ethics and justice; in other words, an unwillingness to separate law from wider concerns or to define law in a narrow 'legalistic' fashion".

97 Mickelson, *supra* note 69, 397: "interconnectedness of subject areas, illustrated by an unwillingness to draw rigid boundaries between various areas of the law (such as economics, human rights, or the environment)".

98 WTO, 'Agreement on Fisheries Subsidies', *supra* note 1, 1.

99 *Ibid.*, 2.

particular situation in order to find appropriate solutions. Third, with regard to the obligation for States to notify fisheries subsidies, the deadline for notification every two years has been extended to four years for "developing Members with a share of the volume of global fish catch of not more than 0.8%, and LDCs". Finally, Article 7 of the AFS provides for the creation of a "voluntary funding mechanism" to support developing States "for the purpose of implementation of the disciplines".

If we take up the historical criterion of analysis stemming from the TWAAIL movement, it is necessary to examine the genesis of the WTO. An international organization created in 1995, it was propelled by the General Agreement on Tariffs and Trade (GATT), an instrument supported by European countries, the United States, and other major trading powers of that era.¹⁰⁰ It wasn't until the end of the 1990s that criticism began to mount against the WTO for its lack of inclusion and consideration of developing countries and their specific needs.¹⁰¹ Although the Doha Round initiated in 2001 marked a step forward in this direction, the negotiations were difficult.¹⁰² However, it was during this Doha Round that the "Special and Differential Treatment" provisions were created, which are "special provisions which give developing countries special rights and which give developed countries the possibility to treat developing countries more favorably than other WTO Members"¹⁰³. Nevertheless, these provisions have been criticized "[...] for being at odds with their stated objectives. The main argument behind such criticisms is that SDT violates the principle of reciprocity – which requires countries to exchange mutual trade concessions – and, in doing so, discourages developing countries from liberalizing [...]"¹⁰⁴. Hegde and Wouters have also ana-

100 WTO, 'History of the Multilateral Trading System', available at https://www.wto.org/english/thewto_e/history_e/history_e.htm (last visited 5 May 2024).

101 *Ibid.*

102 WTO, 'Special and Differential Treatment Provisions', available at https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited 5 May 2024).

103 *Ibid.*

104 P. Conconi & C. Perroni, 'Special and Differential Treatment of Developing Countries in the WTO', 14 *World Trade Review* (2015), 1, 67, 68, available at [Special and Differential Treatment of Developing Countries in the WTO | World Trade Review | Cambridge Core](#) (last visited 5 May 2024).

lyzed these provisions and their legal typology inter alia the distinction between obligations of means and obligations of result.¹⁰⁵ One of the key points of their findings is that "only 21% (47 provisions) of SDT provisions actually result in differential treatment. The rest of the provisions do not produce the intended goal of differential treatment to developing Members in a concrete manner"¹⁰⁶. Through the prism of Anghie's TWAIL question, it is relevant to ask whether these provisions will have a real impact on developing States and, a fortiori, on the populations who live there and depend on fishing to survive. A particular criticism has already been levelled at the aforementioned provision allowing developing countries to notify every four years instead of every two. Indeed, although this provision seems at first sight to make things easier for developing countries, it does not take sufficient account of fisheries administrations and the work involved in such notifications,¹⁰⁷ even if they are to be made every four years instead of every two.¹⁰⁸ Even if, in that sense, the AFS does take into account differences between countries and their needs, it turns a blind eye to the differences in the resources available to national administrations.¹⁰⁹ Also, this kind of exception discourages countries from passing the 0.8% mark and is therefore double-edged.¹¹⁰ Furthermore, the provisions do not seem to be precise enough to have a real impact on the ground. Advocating that the needs of developing countries must be taken into account remains a vague formulation that is unlikely to lead to any real progress on the ground. Dissatisfaction with the AFS – particularly with its SDT provisions¹¹¹ – was one of the sources of dissensus at the 13th Ministerial Conference

105 V. Hegde & J. Wouters, 'Special and Differential Treatment Under the World Trade Organization: A Legal Typology', 23 *Journal of International Economic Law* (2021), 3, 551–571, available at <https://doi.org/10.1093/jiel/jgab033> (last visited 5 May 2024).

106 *Ibid.*

107 K. Wills, 'Navigating the WTO's Illegal, Unreported, and Unregulated Prohibition for Countries in the Caribbean Community', available at [Navigating the WTO's Illegal, Unreported, and Unregulated Prohibition for Countries in the Caribbean Community | Mercatus Center](#) (last visited 5 May 2024).

108 *Ibid.*

109 *Ibid.*

110 Kessler, *supra* note 80.

in February 2024, and its progress was blocked, even though major actors such as the US, the European Union, or even China were keen to extend the AFS's scope and ambitions.¹¹²

F. Conclusion: Is the AFS a Message Bottle Lost at Sea or an Historical Tide?

Through a comparative analysis of certain provisions of UNCLOS, the Agreement on Port State Measures (PSMA), and the legal instruments of the AFS, we have been able to highlight the complementary nature of these instruments. Through the lens offered by the TWAIL movement and the three criteria derived from it, we have been able to clear up some of the issues that undermine the potential impact of the AFS. Whether due to its failure to take into account the reality of small-scale fisheries and fishing-dependent communities or due to its evaluation system based on scientific evidence, the AFS remains an inequitable instrument. Although its preamble expresses concern for developing countries and their SDT, it nevertheless presents substantial shortcomings. In its current form, we believe that it can only provide a partial solution, with potentially neg-

- 111 Denamiel, Schleich & Reinsch, *supra* note 42: "The new fisheries deal was the main focus of MC13 negotiations until the end of the ministerial. The major barrier to a deal was disagreement over the mechanism that leveled the playing field for developing countries. Known as special and differential treatment (SDT) provisions, these policy mechanisms are meant to ease the burden of compliance with WTO agreements. India, in particular, took issue with several SDT-related issues. Reports suggested that the Indian delegation led the effort against the fisheries text. They eventually stated that the deal would not support the interests and welfare of the fishing community. Notably, a coalition of Pacific islands opposed a late draft deal for not going far enough. The nations (which do not have the financial capacity of larger states) argued that the text did not address the island nations' demands to put a hard cap on subsidies. The U.S. negotiators worked to include a forced labor provision into the fisheries negotiations, but the effort eventually died with the rest of the deal. In the end, delegates left MC13 with no progress on fisheries beyond the MC12 deal. A slate of issues will continue to plague global fishing, particularly the lack of subsidy bans on active overfishing".
- 112 A. Beattie, 'A Weak WTO Will Damage the Planet More Than it Hurts Free Trade', *Financial Times* (04 March 2024), available at <https://www.ft.com/content/5ab63dbd-9c9c-467b-9a81-19db00559ab4?shareType=enterprise> (last visited 5 May 2024).

ative consequences for artisanal fishing. The TWAIL criteria of interconnection, justice, and history have revealed the colonial nature of the AFS, which remains an instrument imbued with Western-centric perceptions.

But would an agreement—unsatisfactory and born out of colonial continuity yet capable of progressive implementation—have been better than no agreement at all? In our view, the AFS is, in its current state, a bottle containing a document full of horizons, but one that awaits being opened and revised so that it may send positive ripples across the world's oceans. However, despite the more abstract critiques of the AFS and those that can be made from a theoretical standpoint, it is true that it experienced a recent development in 2025. Specifically, on 15 September 2025, at the 12th Ministerial Conference, the AFS entered into force. A total of 114 Members, including numerous developing countries, decided to deposit their instruments of acceptance of this text.