THIRD WORLD NETWORK ANALYSIS

Special and Differential Treatment takes a beating in the new Draft Fisheries Text submitted to Ministers for WTO MC12

By Ranja Sengupta

A new draft "Agreement on Fisheries Subsidies" WT/MIN(22)/W/20 was submitted on 10 June 2022 at the World Trade Organization (WTO). This will be considered by trade ministers during the upcoming 12th Ministerial Conference of the WTO to be held on 12 to 15 June in Geneva.

Even though a multitude of contentious issues remains unresolved as of 8 June, the fisheries subsidies negotiations Chair, Ambassador Santiago Wills of Colombia, seems to have taken the liberty to clean up the text and remove most of the square brackets i.e. issues lacking consensus and still be to be negotiated. This clean-up operation has especially adverse consequences for special and differential treatment (S&DT), a key demand of several developing countries over the past five years of negotiations and mandated by the United Nations Sustainable Development Goal (SDG) target 14.6. On the other hand, exemptions for developed countries and large subsidisers have been confirmed and progress unimpeded for the consideration of Ministers.

Mandated by SDG 14.6, the negotiations have been taking place since 2017 under 3 pillars: (a) illegal, unreported and unregulated (IUU) fishing covered under Article 3; (b) overfished stocks (OS) covered under Article 4; and (c) overcapacity and overfishing (OCOF) covered under Article 5. Negotiations have been plagued by deep divides especially between developing and developed countries, though there are multiple complex technical issues that were also unresolved.

This quick analysis attempts to summarise some of the key gains and losses as compared to the 24 November 2021 version of the Chair's text: WT/MIN(21)/W/5. An analysis of key issues in the Chair's text up to the 24 November version is available here.

Losses for Developing Countries

- Under Articles 3.8 and 4.4, S&DT for low income, resource poor and livelihood fishing or fishing-related activities in developing countries and LDCs remains limited, first, to 12 Nautical Miles (NTM) and second, for only 2 years. Developing countries had demanded this exemption should apply to the Exclusive Economic Zone (EEZ) and extend to 5-7 years. The number of years was in square brackets in the 24 November version of the Chair's text, leaving some scope for increasing the exemption period, but that option is eliminated in the 10 June 2022 version. These limited exemptions and residual commitments will be applicable to LDCs as well, who though exempted from obligations under the OCOF pillar (Article 5) are not exempted from obligations under IUU (Article 3) and overfished stocks (Article 4).

- Also frozen now (without square brackets) are Articles 4.3 and 5.1.1 which are the reverse S&DT provisions that would help developed countries and large subsidisers who have built up the necessary mechanisms with decades of subsidization, to take advantage of the exemption clauses if they can prove that they are fishing "sustainably".

This again ignores several proposals from India and other developing countries to make it criteria-based and to narrow its scope rather than provide a blanket exemption to large subsidisers to continue their subsidies. This runs counter to the principle of Common but Differentiated Responsibility (CBDR) which should have placed proportionately higher obligations on those that have historically responsible for the condition of marine resources today through overfishing on an industrial scale.

- Article 5.5(a), previously Article 5.4(a) in the 24 November version, was proposed by India to exempt developing countries from OCOF disciplines prescribed under Article 5.1 within the EEZ for a period of 25 years. In the last two iterations, the number of years was in square brackets and was to be negotiated. The current text offers this exemption "for a maximum of 7 years after the entry into force of this Agreement" or "up to the year 2030". This is far from the 25 years that India, along with several other developing countries had thought to be a legitimate period. A maximum of 7-8 years is inadequate to develop the necessary infrastructure, monitoring and registration mechanisms in developing countries.

- There is an interesting change in footnote 14 (earlier footnote 12). In the 24 November 2021 version, developing countries which contribute more than, or equal to, 10% of annual global marine capture, were barred from having recourse to the S&DT provisions under Article 5.4 (now Article 5.5). China with a share of 15.13% was the only country impacted by this footnote. The current version puts this threshold limit of 10% in square brackets implying this can either go up or down. If it goes down, it can impact countries such as Indonesia which accounts for about 8.59% of annual global marine capture or even India which is at 4.53%. However, it is unlikely that this limit will go up enough to allow China to be able to use S&DT provisions under Article 5.5.

- India's proposal to discipline non-specific fuel subsidies which were square-bracketed under Article 1.2 in the November version, is now fully deleted. But interestingly, while there are no disciplines on non-specific fuel subsidy, its place under notification provisions under Article 8.2 seems to be confirmed. Article 8.2 says "notwithstanding Article 1, and to the extent possible, each Member shall notify the Committee in writing on an annual basis of its fuel subsidies granted or maintained by a Member to fishing and fishing related activities that are not specific within the meaning of Article 2 of the SCM Agreement". This seems to be simply a notification requirement that relates to the Agreement on Subsidies and Countervailing Measures and not to any disciplines under this Agreement. It is to be noted that the developed countries use such subsidies extensively and have been resisting the inclusion on non-specific fuel subsidies under the disciplines. For the Agreement to meet the mandate of SDG 14.6, these subsidies needed to be disciplined with special and differential treatment for developing countries and LDCs.

Mixed Gains for Developing Countries and LDCs

What is interesting is that the limited gains for developing countries are also mixed, seeming to hold back with one hand while apparently granting concessions with the other.

- Rules related to subsidies for distant water fishing was earlier pushed under the main list of Article 5.1 subsidies by developed countries such as the European Union, and was therefore subject to the benefits offered by the sustainability-based exemption under Article 5.1.1. But it seems that it is now out of the purview of Article 5.1 and moved back under a new Paragraph 5.2.(a) which means it will not enjoy the exemptions under Article 5.1.1.

This seems to be the only gain for many developing countries including India at the moment. But at the same time, this will only impact China as the EU, a major distant water fishing nation, will continue to get protection from the exemption of "government-to-governments payments under agreements and other arrangements with coastal Members" under Article 5.2(b).

India's proposal to include "subsidies arising from the further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fisheries within the jurisdiction of such other Member" (RD/TN/RL/158, 6 June 2022) in this regard has been ignored. India's proposal to subject distant water fishing nations to a moratorium on giving any kind of subsidies for 25 years for fishing or fishing-related activities under the OS and OCOF pillars are also not included.

- Under Article 5.5.(b)(i), a *de minimis* exemption for those developing countries that contribute less than or equal to 0.8% of annual global marine capture production has now increased compared to 0.7% prescribed under the 24 November version. According to the latest statistics released by the Negotiating Group on Rules on the 11th of June 2022 (RD/TN/RL/151/Rev.1), 3 countries i.e. South Africa, Ecuador and Chinese Taipei are now the additional beneficiaries based on data for 2020. The demand from developing countries was to exempt at least those countries with a share of 1% or less.

  There is some additional concession addressing concerns from several developing countries who hover near the threshold. Under Article 5.5.(b)(ii) "a Member remains exempted until its share exceeds the threshold in Article 5.5(b)(i) for three consecutive years". So if a country crosses the threshold for 3 years**,** it still gets the exemption. However, the text adds that "[a Member] shall be re-included in Article 5.5(b)(i) when its share of the global volume of marine capture production falls back below the threshold for three consecutive years". This means that such a Member will not be eligible to avail of the benefit of Article 5.5(b)(i) if their share falls back below 0.8% in the fourth year but they will have to wait another three years to be eligible for this exemption.

- Under Article 5.5(c), exemption for low income, resource poor and livelihood fishing or fishing-related activities now has an option for coverage up to 24 NTM, in addition to the earlier option only up to 12 NTM. If 24 NTM is finally agreed upon, it will cover archipelago waters but is still far from the developing countries' demand of extending to the EEZ or 200 NTM. In addition, the proposal by India, Sri Lanka and others to make this exemption applicable to "low income **or** resource-poor **or** livelihood fishing" (emphasis on alternatives added) based on Article 6.2 of the Agreement on Agriculture has also been ignored. The current formulation implies all three criteria have to be met in order to be eligible for S&DT under this provision.

- Under Article 6.2, an "*LDC Member may grant or maintain the subsidies referred to in Article 5.1 to fishing and fishing related activities within its EEZ and the area of competence of a relevant RFMO/A for a maximum of [X] years after the entry into force* *of a decision of the UN General Assembly to exclude that Member from the "Least Developed Countries" category*". This was in square brackets in the 24 November 2021 text and is now confirmed. However, the exemption period for allowing subsidies in the EEZ is yet to be agreed.

[RFMO/A means Regional Fisheries Management Organisation or Arrangement.]

It is important to note that most of the impacted countries are those with large populations dependent on fishing. According to FAO statistics, China accounts for 24.40%, Indonesia 7.04%, and India 25.85% of global fishers, while the US accounts for only 0.49%, Japan 0.46%, Russia 0.36%, and Norway 0.03% of global fishers respectively. Except for China, most others do not have the fishing capacity to fish in distant waters. If per fisher subsidies are compared (2014-15), India gave only USD14.50 per fisher, Indonesia gave USD91.87 and China gave USD510. This is nothing compared to what some of the rich countries give as subsidies. The US subsidy is USD4956, Japan's is USD8385 and Canada's is USD31800 per fisher. However, per fisher subsidies as a basis for disciplines has never made much headway in the negotiations.

In sum, the balance that developing countries had asked for in the text is now totally undermined. Further, the agreement could not be farthest from the principle of CBDR that places higher obligations on those historically responsible for overfishing, depletion of stocks and marine resource degradation. If Ministers at the 12th WTO Ministerial Conference agree to sign this document as the Agreement on fisheries subsidies, the mandate of SDG 14 and of target 14.6 will be turned upside down.

Not only will the mandate to recognize that "appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the WTO fisheries subsidies negotiation" be violated, but the main mandate of SDG 14 to "conserve and sustainably use the oceans, seas and marine resources towards marine conservation" will never be met. The target of the SDG 14.6 to protect fish stocks for sustaining the livelihoods of small-scale fishers will become a travesty.