

Fisheries subsidies negotiations towards the WTO's 12th Ministerial Conference: Considerations for developing countries and LDCs

Ranja Sengupta
27 May 2022

The mandate to discipline fisheries subsidies comes from the 2001 Doha Ministerial Conference, but got reinvigorated by Sustainable Development Goal 14.6 that mandates the World Trade Organisation (WTO) to “*prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU [illegal, unreported and unregulated] fishing ..., recognizing 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*”. The objective of SDG 14.6 is not to address trade distortions but to ensure environmental, in particular marine, conservation, by stopping overfishing that is artificially encouraged by subsidies. WTO negotiations to discipline harmful subsidies were launched after a work programme was decided in Buenos Aires in 2017. It aimed at conclusion originally by 2020 but this then got postponed to the 12th Ministerial Conference of the WTO, initially scheduled to be held between 30 November and 3 December 2021 but since postponed to 12-15 June 2022.

The negotiations are taking place under three pillars: a) IUU fishing; b) overfished stocks (OS); and c) overcapacity and overfishing (OCOF). There are wide differences between WTO Member States on many key issues, including the definition of harmful subsidies; the definition of IUU and how it may include small fishers in developing countries; scope and definitions of the different concepts, including of small fishers; and the management role of the WTO.

But the issue of special and differential treatment (S&DT) remains the most sensitive and the most contested by some of the largest subsidisers. Many developing countries and groups, in particular the African, Caribbean and Pacific (ACP) Group, the African Group, Group of Least-Developed Countries (LDCs), India, Morocco, Cameroon, Panama, Sri Lanka, Taiwan and others, have continuously sought effective S&DT for developing countries and LDCs as the fisheries sector is a major source of livelihoods and food security in their countries. The presence of a large fishing and subsidising country like China has complicated the discussion on S&DT during the negotiations.

Third World Network (TWN) is an independent non-profit international research and advocacy organisation involved in bringing about a greater articulation of the needs, aspirations and rights of the peoples in the South and in promoting just, equitable and ecological development.

Published by Third World Network Berhad (198701004592 (163262-P))

Address: 131 Jalan Macalister, 10400 Penang, MALAYSIA **Tel:** 60-4-2266728/2266159 **Fax:** 60-4-2264505
Email: twn@twnetwork.org **Website:** www.twn.my

The contents of this publication may be republished or reused for free for non-commercial purposes, except where otherwise noted. This publication is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License.

Estimates by Sumaila et al. (2019)¹ show that the 10 largest subsidisers among the countries ranked highly under the Human Development Index (HDI) (excluding the EU) contribute USD22.7 billion or 64% of the global fisheries subsidies. Total subsidies provided by all high HDI countries amounted to 87%, as opposed to only 13% of the global total subsidies by the low HDI countries.² The focus on limiting S&DT is counter-productive in this context. According to the data on 82 maritime countries covered in the study, approximately 58 developing countries excluding China provide 44% of global subsidies, with just 23 developed countries contributing 35%, and China contributing the residual 21%.

The Chair's text

The Chair of the negotiations, Ambassador Santiago Wills from Colombia, has tabled several versions of the current consolidated text (WTO document TN/RL/W/276), on 11 May, 30 June and 8 November respectively. The Chair's text has presented several challenges for developing and least-developed countries. On the one hand, S&DT is subjected to time limits (2-5 years in TN/RL/W/276/Rev.1) and a geographical constraint of 12 nautical miles even on subsidies to very small fishers in both developing and least-developed countries, with major resistance to any S&DT for fishing in the exclusive economic zone (EEZ). All S&DT exemptions have mandatory and onerous notification requirements.

On the other hand, developed countries, many of which are large subsidisers, enjoy a broad exception clause that allows subsidies if “the subsidizing Member demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level” (Article 5.1.1, TN/ RL/W/276/Rev.1). This is interpreted to be reverse S&DT for large subsidisers, often with industrial and distant-water fishing fleets like those from the EU.

The key features of the first two versions (May and June) of the Chair's text include:

- a) S&DT is given in the form of an exemption on subsidies to low-income, resource-poor or livelihood fishing or fishing-related activities at sea in developing countries and LDCs operating within 12 nautical miles³ for 2 years for IUU (Article 3) and OS (Article 4). This places both time and geographical constraints even on subsidies to very small fishers in both developing and least-developed countries. Many countries (e.g., the ACP Group countries) have maintained that low-income and resource-poor fishers should be excluded from the scope of the disciplines altogether instead of being covered under S&DT.
- b) LDCs are exempted from disciplines under OCOF (Article 5) but developing countries are still subjected to a time-bound limit (5 years) and geographical limits on subsidies.
- c) India proposed criteria-based S&DT for developing countries for OCOF (Article 5.5 Alt 1, TN/RL/W/ 276/Rev.1) based on gross national income (GNI) per capita, less than 2% share of global marine capture, whether the country is a distant-water fishing nation, and a less than 10% share for agriculture, forestry and fishing in national gross domestic product (GDP). The developed countries suggested (Article 5.5 Alt 2, TN/RL/W/276/Rev.1) an exemption for low-income, resource-poor or livelihood fishing or fishing-related activities in developing countries operating within 12 nautical miles, with a limit of 5 years for fishing in the EEZ. Exemption can also be sought by developing countries if they contribute less than 0.7% of global marine capture or if annual subsidies are less than USD25 million.
- d) All S&DT exemptions have mandatory and complicated notification requirements that currently include the need to provide a wide range of data and information about fishery stocks, conservation and management measures, fleet stocks and vessels.

¹ Sumaila et al. (2019). Updated estimates and analysis of global fisheries subsidies. *Marine Policy* 109, 103695.

² High HDI countries include China.

³ This is drawn from a proposal by Argentina, Chile and Ecuador (RD/TN/RL/136, 22 February 2021) on artisanal fishing.

- e) Interestingly, Article 5.1.1 and Article 4.3 (TN/RL/W/276/Rev.1) provide a broad sustainability-based exemption to those who demonstrate for example that “measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level” (Art. 5.1.1). This will allow countries with advanced monitoring mechanisms, possibly financed by years of subsidization, to measure fish stocks to escape the prohibition on OCOF subsidies, when most developing countries lack such mechanisms, unlike developed countries. Sumaila et al. (2019) point out that the largest proportions of developed-country subsidies go to fisheries management, amounting to 26% of their total subsidies.

The two texts saw major resistance from most of the developing-country groupings, which called for more disciplines on large subsidisers with industrial-level fishing fleets and for a strengthening of S&DT so that it addresses genuine needs of developing countries to support fishing sectors and, in particular, small-scale fishers in their countries. Many developing Members also raised the issue of Common but Differentiated Responsibilities (CBDR), or in other words, the historical responsibility of developed countries as they have contributed most of the marine resource degradation and pollution.

The Chair’s current text

The Chair’s texts of 8 November (TN/RL/W/276/Rev.2)⁴ and 24 November (WT/MIN(21)/W/5) brought in some improvements on S&DT compared with the earlier two versions:⁵

- 1) Under Article 5.4.b, in a *de minimis* approach, developing countries contributing less than 0.7% of annual global marine capture production (5.4.b.i) and subsidies for low-income, resource-poor fishers operating within 12 nautical miles in developing countries (5.4.b.ii) are now permanently exempt from the disciplines under the OCOF pillar.
- 2) Under Article 5.4.a, there is a proposal to exempt OCOF (Article 5) subsidies for EEZ fishing in developing countries for some (x) years which has to be negotiated.
- 3) The time limits on exemptions for low-income, resource-poor fishers under IUU (Article 3) and OS (Article 4) have been put in square brackets, as opposed to the earlier proposal of 2 years, which means the period can be negotiated up (or down).
- 4) LDCs are exempt from Article 5.1 disciplines while graduating LDCs must negotiate a carveout for a specific period under Article 6.2.
- 5) A voluntary WTO funding mechanism is proposed under Article 7 to provide technical and capacity-building assistance to developing countries and LDCs.

These are some gains for developing countries and those countries falling within the 0.7% of global capture limit, including several African and Pacific countries, will benefit.

But there are several critical problems for developing countries as well:

- The indicator of global marine capture is one-dimensional and does not capture many dimensions such as the nature of a country’s fleet, whether it is a distant-water fishing nation, volume of subsidies in relation to catch and number of fishers, just to name a few.
- According to UN Food and Agriculture Organisation (FAO) data for 2019, many developing countries including China (15.13%), Indonesia (8.59%), India (4.53%), Philippines (2.33%), Malaysia (1.79%), Mexico (1.75%), Thailand (1.73%) and Argentina (0.98%) will not be covered by this provision.
- Countries falling just below the limit (with contribution above 0.5%) such as Senegal, Namibia, South Africa, Nigeria, Turkey and Sri Lanka may go above it in the near future. In addition, any use of exemptions by any country must meet the onerous and mandatory notification requirements

⁴ See Ravi Kanth (2021). Asymmetries aplenty in revised draft fisheries text for MC12. *SUNS* #9456, 10 November 2021, republished in TWN Info Service, <https://twn.my/title2/wto.info/2021/ti211110.htm>

⁵ For a detailed analysis of the Chair’s 8 November text, see Pacific Network on Globalisation (PANG) (2021). Assessment of November Fisheries Chairs Text (276/Rev2). November 2021.

(Article 8.4). In contrast, technical assistance is given only on a voluntary basis (Article 7). Also, as pointed out by Pacific Network on Globalisation (2021), the prohibition on IUU subsidies now extends to “fishing related activities in support of such fishing”, thus considerably expanding the scope.

- In an additional footnote (no. 12) in the context of Article 5.4 which is the S&DT paragraph, those countries with a share higher than 10% in annual global marine capture production are excluded from the benefits under this paragraph. This is the only difference between the 8 November and 24 November versions. This will exclude China from using S&DT for OCOF subsidies. However, Indonesia is quite close to the limit as well and can lose S&DT if its share increases to 10% and above in the future.

There are significant gains for developed countries in the text:

- 1) Articles 5.1.1 and 4.3, which provide a blanket exemption for developed countries who can easily demonstrate they follow the standards they set themselves, remain undiluted and do not get qualified by other criteria suggested by the ACP Group, India and South Africa among others.
- 2) Provisions related to distant-water fishing are now moved under Article 5.1 (from being a standalone provision under Article 5.2 of TN/RL/W/276/Rev.1), therefore giving it the benefit of the escape route of Article 5.1.1. This will help distant-water fishing nations such as the EU. The EU’s access agreements also get a clear recognition under the notification clauses (Article 8.2.c). A recent proposal by India that suggested disciplines on distant-water fishing nations does not find any mention in this text.
- 3) The US’s proposal on forced labour is incorporated under Article 8.2.b, which suggests a clause regarding notification of forced labour but lacks clarity on details, especially as to whether a Member can notify about vessels in its own jurisdiction or those of others as well. This clause seems to be an effort to get both the proponent and the target countries on board as it seemingly involves only notification and no action on subsidies as such. However, China and Russia seem to have rejected this clause⁶ on the grounds that the issue of forced labour does not belong in the WTO and that Article 8.2.b lacks clarity.

What is expected for MC12

There may be pressure on the developing countries which are still adversely impacted by the 8 November text to accept a deal, especially with the SDG deadline of 2020 being invoked as an unfulfilled mandated deadline.

Issues of concern from a developing-country perspective

- a) The 8 November text makes some concessions on S&DT and thus aims to get several developing countries on board. But it gives higher concession to advanced countries which are major subsidisers and distant-water fishing nations by retaining Article 5.1.1, which provides quite a strong exemption to advanced countries and which now also applies to distant-water fishing subsidies.
- b) Several developing countries which do not fulfil the criterion of contributing less than 0.7% of global marine capture but which still have very small and poor fishers will have exemptions on OCOF subsidies for such fishing only up to 12 nautical miles and not for the EEZ. However, it is clear that small fishers in every country do go into the EEZ for fishing purposes, sometimes even unknowingly, and now stand to lose subsidies to support their activities.
- c) Actual S&DT for OCOF subsidies on fishing in the EEZ for developing countries that fall above the 0.7% limit will depend on the length of exemption. This period is subject to negotiations under Article 5.4.a. In a recent proposal (RD/TN/RL/147), India had suggested a 25-year exemption. Unless these developing countries can get a relatively long period, they will not benefit as most

⁶ <https://twn.my/title2/wto.info/2021/ti211117.htm>

developing countries' infrastructure cannot be developed quickly enough to manage without subsidies. Nor are their monitoring mechanisms able to develop enough in a short period of time to enable them to take advantage of Article 5.1.1 or Article 4.3.

- d) Those developing countries contributing less than 0.7% of global marine capture will still have commitments, beyond a period that is still to be negotiated under Articles 3 and 4 with notification requirements for use of flexibilities under all three pillars.
- e) Under Article 6.1, though LDCs are fully exempt from commitments on OCOF (Article 5.1), they will still have to make cuts to subsidies on IUU fishing and overfished stocks (Articles 3 and 4) for a period that has to be negotiated hard. Any use of exemptions on all pillars will again be subject to the stringent transparency and notification requirements (Article 8.4). The current text offers more optical illusion than actual benefits to LDCs in real terms.
- f) Graduating LDCs will also have to negotiate hard for a long enough transition period either on all subsidies under Article 5.1 or on subsidies on EEZ fishing. In fact, under the current Article 6.1 Alt 1, graduating LDCs are treated worse than some developing countries which get permanent exemption if they contribute less than 0.7% of global marine capture. This will affect countries such as Bangladesh which are graduating soon.
- g) It is important to note that most of these countries have large populations dependent on fishing. According to FAO statistics,⁷ 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 with what some of the rich countries give. The US subsidy is USD4,956, Japan's USD8,385 and Canada's is USD31,800 per fisher. However, per-fisher subsidies as a basis for disciplines have never made much headway in the negotiations.
- h) The outcome may see the WTO make determinations related to what are essentially management and conservation issues under the domain of fisheries management authorities, including national bodies, the regional fisheries management organisations (RFMOs) and other relevant bodies, in which it has no expertise nor experience. The concern that the WTO will now encroach on the mandates and authority of other international agreements such as the United Nations Convention on the Law of the Sea (UNCLOS) is also still unassuaged.
- i) The issue of non-specific fuel subsidies (which are not targeted towards a specific sector) which are used extensively by developed countries is included under Article 1.2, with notification clauses under Article 8.1bis. Both of these paragraphs are still in square brackets to be negotiated and agreed, and face major attack from developed countries. This is in spite of several proposals by India and other developing countries to include non-specific fuel subsidies under the disciplines for subsidy cuts. If agreed, any discipline on non-specific fuel subsidies must include S&DT.

Approaches for developing countries to consider

- Developing countries must continue to push for strong and effective S&DT on the grounds that most of them are not the biggest polluters and CBDR should be a key underlying principle. Nor are they the largest subsidisers, especially considering the number of fishers operating in these countries.
- Developing countries should continue to fight for stronger exemptions under S&DT, one of which can be to ask for Article 5.1 exemption for countries contributing less than 2% of global marine capture, as included in the Chair's text of 30 June (Article 5.5 Alt 1.c.ii, TN/RL/W/276/Rev.1).
- Developing countries can make commitments *strictly contingent* upon technical and financial assistance from developed countries. But given that such assistance is unlikely to materialise in reality, it would make sense for all developing countries and LDCs to fight for less stringent notification conditions for all S&DT provisions.

⁷ FAO (2019). FAO yearbook. Fishery and Aquaculture Statistics 2017. Available at https://www.fao.org/fishery/static/Yearbook/YB2017_USBcard/navigation/index_intro_e.htm

- Simultaneously, the escape clause for developed countries must be criteria-based and narrowed down, as in its current form Article 5.1.1 will allow the highest subsidisers to continue subsidising, thus completely overturning the objective behind SDG 14.6. Further, it will increase the inequity between developed and developing countries as the latter cannot really make use of this provision.

Points of caution

This outcome should not be linked to outcomes on other MC12 tracks, including agriculture negotiations, or the negotiations on the TRIPS waiver under the General Council. That will imply that concessions have to be made in any of these tracks in order to get positive outcomes in another, whereas developing countries need and have the right to development-friendly outcomes across all these negotiations.

Conclusion

The Chair of the negotiations is putting in considerable effort to apparently reconcile differences by allowing some improvements in S&DT for some developing countries and LDCs on the one hand, and by granting further concessions to advanced fishing countries on the other. But the text still undermines the interest of small fishers in developing countries. In fact, a lot of the additional benefit promised is mere optics. But the exemption to large subsidisers continues, which will ensure that the objective behind and the mandate of SDG 14.6 is never met. At the same time, small fishers in poorer countries, whose livelihoods SDG 14.6 attempts to secure, will be losing all possible support from their governments.